

# Michigan Law Review

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Volume 113 | Issue 1

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2014

## The Political Safeguards of Horizontal Federalism

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### Recommended Citation

Heather K. Gerken & Ari Holtzblatt, *The Political Safeguards of Horizontal Federalism*, 113 MICH. L. REV. 57 (2014).

Available at: <https://repository.law.umich.edu/mlr/vol113/iss1/2>

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## THE POLITICAL SAFEGUARDS OF HORIZONTAL FEDERALISM

Heather K. Gerken\*  
Ari Holtzblatt\*\*

*For decades, we have debated whether “political safeguards” preserve healthy relations between the states and the federal government and thus reduce or eliminate the need for judges to referee state–federal tussles. No one has made such an argument about relations among the states, however, and the few scholars to have considered the question insist that such safeguards don’t exist. This Article takes the opposite view and lays down the intellectual foundations for the political safeguards of horizontal federalism.*

*If you want to know what unites the burgeoning work on horizontal federalism and illuminates the hidden logic of its doctrine, you need know only one fact: lawyers hate spillovers. Whether it is a state’s decision to license same-sex marriage or set high emissions standards or maintain lax gun-ownership rules, we worry when one state’s regulations affect residents in another state. And just as most scholars aspire to prevent spillovers, most look to the courts to fix the problem.*

*The current state of the law and literature makes clear why no one has thought to develop a safeguards account of horizontal federalism to match the one that dominates debates over vertical federalism. Why bother with political safeguards if politics is the problem and the judiciary is the solution?*

*In this Article, we don’t just question the consensus against spillovers but offer an affirmative account as to why much interstate conflict can or should be left to the free play of politics. Our argument emphasizes the democratic possibilities associated with spillovers and looks to vertical federalism as a model for thinking about how the states ought to interact with each other. Spillovers,*

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\*\* Senior Associate, WilmerHale. For excellent comments, we would like to thank Bruce Ackerman, Akhil Amar, Will Baude, Jessica Bulman-Pozen, Kris Collins, Allan Erbsen, Abbe Gluck, Alexandra Lahav, Daryl Levinson, Justin Levitt, Gillian Metzger, Jon Michaels, Erica Newland, Cristina Rodríguez, Mark Rosen, Ted Ruger, David Schleicher, Ernie Young, Timothy Zick, the students in the Local Government in Action seminar and Advanced Federalism seminar at Yale Law School, Heather Gerken’s constitutional law small group, the participants in the “Federalism All the Way Down” Symposium at the University of Colorado Law School, the participants in the Wisconsin “Con Law Schmooze,” and the faculties of the University of Iowa College of Law, the University of Pennsylvania Law School, the University of Toronto Faculty of Law, William & Mary School of Law, and Yale Law School. We are grateful to the following students for their excellent research assistance—Spencer Amdur, Noah Bokot-Lindell, Emily Barnet, Sophie Brill, Megan Browder, Tom Brown, Marguerite Colson, Samir Degen-Sen, Greg Dubinsky, Micah Fergenson, Sundeep Iyer, Webb Lyons, Aaron Nathan, Rosa Po, Ravi Ramanathan, Danny Randolph, Daniel Rauch, Matt Shapiro, Zayn Siddique, David Simins, Elizabeth Song, and Tina Thomas. We owe special thanks to Jonathan Meltzer for his extremely helpful comments along the way.

after all, occur just as routinely between the state and federal government as they do between the states. State–federal friction, however, is understood to be both a problem and a valuable part of a well-functioning democracy. The same should be true of horizontal federalism. Our goal should not be to suppress friction but to harness it—to shut down damaging spillovers while allowing productive ones to run their course.

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## INTRODUCTION

For decades, we have debated whether “political safeguards” preserve healthy relations between the states and the federal government and thus reduce or eliminate the need for judges to referee state–federal tussles.<sup>1</sup> No one has made a similar argument about relations *among* the states, however. To the contrary, the few scholars to have considered the question insist that such safeguards don’t exist.<sup>2</sup> This Article takes the opposite view and lays down the intellectual foundations for the political safeguards of horizontal federalism.

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If you read the *U.S. Reports*, you’d probably miss that “Our Federalism” depends on relations among the states just as it depends on relations between the states and the federal government.<sup>3</sup> But while the vertical dimensions of federalism have generated countless paeans, courts and scholars have neglected federalism’s horizontal dimensions.

We know how “Our (Vertical) Federalism” is supposed to work. Vertical federalism is thought to promote choice, foster competition, facilitate participation, enable experimentation, and ward off the national Leviathan.<sup>4</sup> That

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1. The effort began, of course, with Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 558–59 (1954).

2. See, e.g., Lynn A. Baker, *Putting the Safeguards Back into the Political Safeguards of Federalism*, 46 VILL. L. REV. 951, 966–72 (2001); Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 117–26 (2001); Scott Fruehwald, *The Rehnquist Court and Horizontal Federalism: An Evaluation and a Proposal for Moderate Constitutional Constraints on Horizontal Federalism*, 81 DENV. U. L. REV. 289, 327–28, 331 (2003). Professor Metzger ever so briefly touches on the strengths and weaknesses of the argument when discussing congressional oversight of interstate conflict. See Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1468, 1506–07 (2007). But what she characterizes as the safeguards argument is quite different from that contemplated here, as is clear from her conclusion—that our current constitutional arrangements “strongly counsel toward seeing judicially enforced interstate antidiscrimination requirements as subject to congressional override.” *Id.* at 1507. The closest thing we could find to our account is a 1989 student note written about a set of guidelines promulgated by the National Association of Attorneys General (“NAAG”). But the note, which is focused on the guidelines’ validity, doesn’t argue in favor of the political safeguards of horizontal federalism, nor does it make the affirmative case for spillovers. It does argue, however, that the NAAG guidelines are evidence that informal cooperative agreements can spring up among the states and thereby obviate the need for a federal referee. See Note, *To Form a More Perfect Union?: Federalism and Informal Interstate Cooperation*, 102 HARV. L. REV. 842 (1989).

3. Even the phrase “Our Federalism,” coined in the early days of the Republic and used by Justice Black, refers to relations between the states and the federal government. *Younger v. Harris*, 401 U.S. 37, 44 (1971).

4. For summaries of these arguments, see, for example, *Gregory v. Ashcroft*, 501 U.S. 452, 457–59 (1991); DAVID L. SHAPIRO, *FEDERALISM: A DIALOGUE* 75–106 (1995); Akhil Reed Amar, *Five Views of Federalism: “Converse-1983” in Context*, 47 VAND. L. REV. 1229 (1994); Baker & Young, *supra* note 2, at 109–10; Steven G. Calabresi, “A Government of Limited and Enumerated Powers”: In *Defense of United States v. Lopez*, 94 MICH. L. REV. 752, 774–79

account lends order and coherence to an otherwise motley range of doctrinal questions, from preemption cases to the Spending Clause, from the regulation of interstate commerce to commandeering.

The same can't be said of "Our (Horizontal) Federalism." Courts, of course, routinely referee disputes between the states and their citizenries. But judges approach these cases seriatim, without an overarching account of how interstate relations are supposed to function.<sup>5</sup>

Until recently, the academy has been little different, with scholars confining their analyses to horizontal federalism's doctrinal silos.<sup>6</sup> But a handful of scholars have started to develop a transsubstantive account of horizontal federalism to match the one we routinely deploy for vertical federalism.<sup>7</sup> The literature is small, to be sure, especially when compared to its well-developed counterpart. But the work now shares a recognizable common core

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(1995); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 3–10 (1988); Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 53–63 (2004); Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1493–1511 (1987) (reviewing RAOUL BERGER, *FEDERALISM: THE FOUNDERS' DESIGN* (1987)). For the case that we reel these arguments off too easily, see Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317 (1997).

5. E.g., MICHAEL S. GREVE, *THE UPSIDE-DOWN CONSTITUTION* 96 (2012); Allan Erbsen, *Horizontal Federalism*, 93 MINN. L. REV. 493, 495 (2008); Fruehwald, *supra* note 2, at 326; Metzger, *supra* note 2, at 1474.

6. Most of the work has focused on the usual suspects—the dormant Commerce Clause, the Due Process Clause, and so forth. But we also see efforts to think about relations among the states in other areas. See, e.g., Keith Cunningham-Parmeter, *Forced Federalism: States as Laboratories of Immigration Reform*, 62 HASTINGS L.J. 1673 (2011) (immigration law); Ann Laquer Estin, *Sharing Governance: Family Law in Congress and the States*, 18 CORNELL J.L. & PUB. POL'Y 267 (2009) (family law); Noah D. Hall, *Toward A New Horizontal Federalism: Interstate Water Management in the Great Lakes Region*, 77 U. COLO. L. REV. 405 (2006) (environmental law).

7. Two of the early movers on this front were Professor Metzger and Professor Erbsen, and both of their accounts continue to dominate the field. See Erbsen, *supra* note 5; Metzger, *supra* note 2. Erbsen has even taken the next step, deploying what he considers to be the general mandates of horizontal federalism and applying them to one of the field's doctrinal silos. See Allan Erbsen, *Impersonal Jurisdiction*, 60 EMORY L.J. 1 (2010) (discussing how horizontal federalism principles might affect personal-jurisdiction jurisprudence). While Erbsen and Metzger ignited this debate, one should acknowledge the early work of Professor Laycock, who invoked the notion of territoriality in building an account of interstate relations that transcended horizontal federalism's doctrinal silos. One should also recognize the work of Professor Resnik, who has focused on federalism's horizontal and even its "diagonal" dimensions. See Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249 (1992); Judith Resnik, *Lessons in Federalism from the 1960s Class Action Rule and the 2005 Class Action Fairness Act: "The Political Safeguards" of Aggregate Translocal Actions*, 156 U. PA. L. REV. 1929 (2008); Judith Resnik et al., *Ratifying Kyoto at the Local Level: Sovereignism, Federalism, and Translocal Organizations of Government Actors (TOGAs)*, 50 ARIZ. L. REV. 709 (2008); Judith Resnik, *The Internationalism of American Federalism: Missouri and Holland*, 73 MO. L. REV. 1105 (2008); Judith Resnik, *Foreign as Domestic Affairs: Rethinking Horizontal Federalism and Foreign Affairs Preemption in Light of Translocal Internationalism*, 57 EMORY L.J. 31, 44 (2007) (noting that "[h]orizontal federalism . . . is coming into view as a subject for the legal academy" and offering one of the early contributions to the trend); Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE L.J. 1564, 1581 (2006).

and has sorted itself into rough-and-ready intellectual camps. It is thus an appropriate moment to assess where that literature stands while offering our own take on where it should go next.

In our view, what's missing from the literature is an account of the political safeguards of horizontal federalism. And it's missing for reasons that go to the field's core commitments. Conflict is a recurring feature of both vertical and horizontal federalism. States intrude on each other's policymaking turf just as often as the state and federal governments regulate at cross-purposes. What divides the two fields is how we should respond to the ineluctable fact of friction. State–federal friction has long been understood to be both a problem and a valuable part of a well-functioning democracy. Vertical federalism's goal, then, has not been to eliminate friction but to harness it, allowing productive state–federal contests to play themselves out. Moreover, most vertical federalism scholars think that the political arena, not the judiciary, is the right forum for these fights. Political institutions, not the courts, represent the true “safeguards” of federalism. And by the “safeguards” of federalism, we refer not to the unreflective notion that politics is meant to safeguard state autonomy but to the correct formulation of the claim, which is that politics safeguards the type of state–federal relations necessary for our democracy to thrive.<sup>8</sup>

Scholars of horizontal federalism are much less sanguine about interstate conflict, and most of them look to the judiciary to referee state-to-state conflict. Congress, administrative agencies, political parties, networked interest groups—all are thought to safeguard vertical federalism. But even though those same institutions are available to mediate conflict *among* the states, there is no safeguards account to be found in horizontal federalism.

Developing a political-safeguards account for horizontal federalism, then, involves both *excavation* and *construction*. First, we must dig into the doctrine and scholarship in order to account for the puzzling differences between the fields. Second, once we've examined (and debunked) the arguments that have prevented scholars from even thinking to develop a safeguards account, we must build it.

As to the first task, it isn't hard to figure out why a safeguards account hasn't emerged in horizontal federalism. One idea unites the burgeoning scholarship and illuminates the hidden logic of much of its doctrine: *lawyers hate spillovers*. We've all absorbed the economists' lesson—some state activities generate positive externalities. But when law professors and judges think about spillovers, they typically focus on the ones that generate controversy—those that residents of the affected state view with dismay. For instance, when lax gun-ownership enforcement in Virginia increases the number of firearms in New York, we worry. When Massachusetts marries same-sex couples from states that don't recognize those marriages, we worry. When California's emissions standards trump the emissions standards of other states, we worry. When the Texas school board's efforts to move its curriculum in a socially conservative direction change textbooks for

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8. See *infra* text accompanying notes 21–24.

many states, we worry. We worry, in short, that state-generated spillovers cause interstate friction, generate inefficiencies, undermine the national marketplace, violate the autonomy of other states, and threaten democracy by preventing citizens of the affected state from choosing their own destinies.<sup>9</sup> These worries so dominate the literature that we don't even have a name for the opposite but equally important notion—that some state policies *should* cross state lines. The debate over whether states should recognize same-sex couples married in other states, for instance, centers on when it is appropriate to give a state decision extraterritorial reach. But while there is a substantial body of research devoted to spillovers, we lack a name for what we term *spillunders*.<sup>10</sup>

Just as most scholars aspire to prevent spillovers, most look to the courts to fix the problem. That impulse finds substantial support in the Supreme Court's doctrine. The Court, for instance, has relied on the Commerce Clause and the Due Process Clause to strike down state laws that reach beyond state borders. Similarly, concerns about spillovers have influenced some of the Court's preemption decisions.

The current state of the law and literature makes clear why no one has thought to develop a safeguards account to match the one that dominates debates over vertical federalism. Why bother with the political safeguards if politics is the problem and the judiciary is the solution? Because we lack a descriptive and normative argument that interstate conflict serves productive ends, there is no reason to think that spillovers can or should be left to the free play of politics.

That leads us to the second task of this paper: building the descriptive and normative argument currently missing from the literature. Our argument begins with a simple observation. The near-universal distaste for spillovers stands in sharp contrast to their near-universal presence in our system. Spillovers are a permanent and inevitable feature of the American regulatory landscape. This fact led us to wonder whether anything *positive* can be said of spillovers. After all, if an affirmative case can be made for spillovers, it should change the way we think and write about them.

None of this is to say that we have any quarrels with the well-known litany of grievances against spillovers. Our goal is to complicate this account, not engage in an intellectual cage match with our theory's competitors. The problem with the existing narrative isn't that we've overestimated the costs associated with spillovers; the problem is that we've underestimated their benefits. That's because spillovers generate friction, and friction has its uses in a democratic system.

The claim that spillovers generate friction may not sound like a propitious start for an *affirmative* case. After all, lawyers are allergic to spillovers

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9. The literature is, of course, more complicated than our aphorism suggests. It draws on a rich and varied set of legal, economic, and democratic theories, and it illuminates a wide range of problems arising from interstate relations. Nonetheless, the fact remains that most of the scholarship—and much of the doctrine—is aimed at preventing spillovers.

10. See *infra* Section II.C.



because they force people to live under another state's rules, something that can engender controversy and conflict. But the friction generated by spillovers isn't all bad. Far from it. That's because interstate friction spurs democratic engagement. Spillovers prevent citizens from nesting too comfortably in their own policymaking enclaves, force political elites to engage with those on the other side of an issue, and create the conditions under which compromise and accommodation are possible, even necessary. Spillovers force us all to live under someone else's law, an underappreciated feature of a well-functioning democracy and an essential practice in a well-functioning union. Opponents of same-sex marriage, for instance, find themselves living next to a gay couple married in another state. Residents of blue states have to read the textbooks designed for a conservative Texas market. Skeptics of environmental reform find themselves driving cars that meet California's high emissions standards. As a result, political elites in these states are prodded to reach across political boundaries, not just territorial ones.

Spillovers also give political entrepreneurs an opportunity to set the agenda, teeing up a fight that will generate more advocates for change and forcing reluctant state or national elites to engage. California's environmental regulations, for instance, led the auto industry (which had been happy with the status quo) to join environmentalists in demanding national regulation. The threat that Hawaii would legalize same-sex marriage prompted the passage of the Defense of Marriage Act ("DOMA"). Spillovers are one of the best means of prodding politicians to do what they are supposed to do: politic, find common ground, negotiate a compromise that no one likes but everyone can live with. In the first half of the century, spillovers generated by state commercial regulations led to the development of the Uniform Commercial Code ("UCC"), which provided a focal point for the politicking and compromise necessary to break the political logjams that had blocked reform within the states. More recently, spillovers associated with air pollution spurred the development of a national solution. Spillovers, in short, can help generate the democratic churn necessary for an ossified system to move forward while enlisting citizens and elites in the project of pluralism.

If you believe, as we do, that there are good reasons to leave much interstate conflict to the free play of politics, two counterarguments immediately spring to mind. Unsurprisingly, both dominate the literature on horizontal federalism.

The first is a normative worry. Many believe that principles of territoriality, equality among the states, and democratic self-rule—typically grouped under the larger rubric of "sovereignty"—require us to tamp down on spillovers. Sovereignty, however, is as elusive in the horizontal context as it is in the vertical one. We are as linked to one another horizontally as we are vertically. Regulatory overlap is the rule. And yet we cling to ideas in horizontal federalism that we discarded long ago in vertical federalism. Our account takes seriously the notions of territoriality and self-rule. But neither is a normative trump card; they must instead be weighed against the normative goods associated with political and economic integration.



The second counterargument is a pragmatic one. The political safeguards of horizontal federalism will fail, of course, if nonjudicial actors are incapable of mediating the most damaging forms of interstate conflict. Scholars of horizontal federalism often write as if this were the case, looking all but exclusively to the courts to referee interstate disputes. Here again, we side with the scholars of vertical federalism, who have long thought that many institutions are as capable as—if not more capable than—the courts in striking the right balance between conflict and cooperation. Congress, administrative agencies, political parties, networked interests groups, and NGOs can and do mediate interstate tussles. One might favor these safeguards of horizontal federalism not just because they are more nimble and flexible than courts but because we won't reap the democratic advantages associated with spillovers if courts always play the role of über-referee. While we do not offer a full-blown defense of this claim here, we suggest that our system is reasonably well structured to harness democratically productive forms of interstate friction while avoiding its more damaging varieties. Given the democratic benefits associated with spillovers, it will often be better to resolve spillover fights through political rather than judicial institutions. And by "better" we mean to invoke not just an argument about comparative institutional competence but also a broader normative claim about how a healthy democratic system should function.

Note that our aims are quite ambitious on this point. It would be easy enough to respond to worries about spillovers by pointing out that they are the natural result of democratic and economic integration. While we make that argument in Part IV, we don't rest our entire case on it. The notion that spillovers are symptoms of a well-functioning system, after all, would only justify tolerating them (because the benefits of an integrated system would outweigh the costs of eliminating spillovers). But this is an account of the *political* safeguards of horizontal federalism. That, in our view, requires us to place our faith in politics rather than merely resign ourselves to the role politics plays. We thus hope to do what scholars of vertical federalism have done: Show that we should not just tolerate conflict but celebrate it. Show that spillovers aren't just a symptom of democratic health but contribute to it.<sup>11</sup>

Here's where we are less ambitious. It took decades of debate, dozens of academics, and thousands of pages to develop a fully satisfying account of the political safeguards of vertical federalism. We are under no illusions that one article can achieve the same feat in the context of horizontal federalism, especially when much of what we say runs against the grain of the doctrine and scholarship. We recognize that our claims are likely to be controversial, and properly so. We recognize that we are likely to make mistakes and miss

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11. While we focus on states here, a substantial amount of our discussion applies to localities as well. As one of us has argued, substate, local, and sublocal institutions play an integral role in "Our Federalism." See Heather K. Gerken, Foreword, *Federalism All the Way Down*, 124 HARV. L. REV. 4 (2010).

arguments that work better than the ones we offer here. And we are painfully aware that a single article cannot possibly provide a fully satisfying safeguards account, which means that a number of our arguments are radically incomplete. At bottom, this Article is designed to provoke—to begin a conversation rather than to offer the final word.

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Part I begins with an effort at excavation. It offers a brief overview of the literature on vertical and horizontal federalism in order to show why a political-safeguards account has dominated the former but is entirely absent from the latter.

Part II digs deeper, homing in on the core concern that has prevented us from developing a safeguards account: a worry about spillovers and the conflict they generate. Hostility to spillovers is ubiquitous within the academy and the judiciary, something that explains why no one has thought to argue that interstate relations can and should be left to the free play of politics.

Having explained the academy's failure to develop a safeguards account, Part III begins to construct our affirmative case. It lays down the foundations of a safeguards argument by showing that, when kept within reasonable bounds, interstate friction plays a useful role in a well-functioning democracy. Spillovers mitigate a core problem at the national level by teeing up conflict and forcing issues on the agenda of reluctant national elites. And spillovers mitigate a core problem at the state level by preventing both political elites and everyday citizens from sorting themselves into all-too-comfortable enclaves.

Once we recast spillovers in these terms, it becomes clear that our goal should not be eliminating spillovers but *managing* them—preventing destructive interstate battles from occurring while allowing productive ones to run their course. Here, we draw on the work depicting vertical federalism as an institutional strategy for harnessing the productive frictions associated with state–federal sparring while ensuring that the polity remains a polity.

Having established our core claim—that many spillovers can and should be left for the political process to resolve—Parts IV and V respond to the two main counterarguments. The first emphasizes the normative goods associated with state sovereignty, and the second goes to the wisdom of depending on political institutions to mediate interstate disputes. In each instance, we suggest that the political safeguards of federalism are as robust horizontally as they are vertically.

## I. HORIZONTAL V. VERTICAL FEDERALISM: A BRIEF OVERVIEW

Before constructing our affirmative case, we'll briefly situate horizontal and vertical federalism within constitutional theory. Or, to be blunt, we'll tell you a tale of tales, describing two markedly different law stories and explaining why the differences in their story lines matter. We do so for two reasons. First, we hope to explain why vertical-federalism scholars have

spent decades arguing over the political safeguards while their counterparts in horizontal federalism have not even thought to develop a safeguards account. Second, we hope to identify precisely what's needed to get such an account up and running.

As noted above, when judges resolve the remarkably eclectic set of cases implicating vertical federalism, they rely on a single, overarching account about how the states and federal government ought to interact.<sup>12</sup> We don't have a distinctive tale about "Our (Horizontal) Federalism" to tell around the law-school campfire. But if you look closely enough, you can see the narrative's basic outlines and observe that its story line diverges substantially from that of vertical federalism.

As with all great stories, conflict is a pervasive feature in both accounts, with governments bumping up against one another as they regulate in the same policymaking space. But we depict conflict quite differently in these two arenas.

In vertical federalism, conflict performs the same role it plays in a Shakespearean comedy. It can be the source of chaos and consternation, but it ultimately gets worked out in the end, leaving us all the better for it. It is a commonplace that we want to maintain a productive tension between the states and federal government. While there have been endless battles over how to maintain that productive tension, the goal has never been to rid ourselves of state–federal friction. Instead, we've sought to harness it, taking advantage of all the benefits friction offers while keeping it within reasonable bounds.

In horizontal federalism, the story of conflict is a tragedy in waiting—a cautionary tale about norms upended and the looming threat of instability. That tale centers on a single narrative: lawyers hate spillovers. And no wonder. There is something disquieting about one state's citizenry regulating another's. Spillovers don't just generate conflict but unsettle deeply held normative commitments to sovereignty, territoriality, and self-rule. We thus see something akin to a one-way ratchet in the literature, with almost every argument focused on reducing spillovers and the conflict they engender.

The story lines of vertical and horizontal federalism diverge in a second, equally important way. They differ as to how we should handle the conflict that inevitably arises as governments regulate shoulder to shoulder in a tight policymaking space. For decades scholars have looked to politics and process, not courts and sovereignty, to referee state–federal scuffles. In 1954, Professor Wechsler famously argued that we should trust the "political safeguards of federalism" to resolve state–federal disputes.<sup>13</sup> On Wechsler's view, the power that state authorities enjoyed over their federal counterparts meant that Congress could be trusted to resolve state–federal conflict, with the courts playing at most a subordinate role. While no one was entirely satisfied by Wechsler's account, it was built up over time. Professor Choper

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12. See *supra* text accompanying note 4.

13. Wechsler, *supra* note 1.

followed a few decades later with a book and article devoted to the subject,<sup>14</sup> although his argument never achieved dominance within the field. During the last two decades, however, scholars have breathed new life into the safeguards account, and the idea has carried the day. To be sure, a majority of the Supreme Court stands ready to intervene on the states' behalf. In the academic world, however, only a handful of scholars insist that the courts should play a substantial role in policing state–federal tussles.<sup>15</sup> We are all process federalists now.

Just as faith in a muscular form of judicial review has gone by the wayside, so, too, has the vernacular of sovereignty. Elsewhere, one of us has argued that scholars remain haunted by sovereignty's ghost—that the de facto autonomy lauded by process federalists bears a strong resemblance to the de jure sovereignty lauded by sovereigntists.<sup>16</sup> Nonetheless, while the Court still clings to the idea of sovereignty,<sup>17</sup> the dominant view in the academy is that sovereignty is dead.<sup>18</sup>

The tale of horizontal federalism is different. There sovereignty lives, and the political safeguards were never born. Almost everyone who writes in the area looks to the courts, and the courts alone, to restore order among the states, with a few scholars suggesting that Congress also has a role to play (albeit in conjunction with the courts).<sup>19</sup> With this heavy emphasis on courts comes a heavy reliance on sovereignty—the idea that states should preside over their own policymaking empires without interference from other states. Sovereignty supplies the grammar of adjudication in horizontal federalism,<sup>20</sup> offering just the type of neat, conceptual categories one needs to order interstate relations and police territorial transgressions.

If you are puzzling over how horizontal institutions could ever safeguard *state power*, then you are missing something important about Wechsler's account. A safeguards account isn't aimed at safeguarding state power. It's

14. JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT* (1980); Jesse H. Choper, *The Scope of National Power Vis-à-Vis the States: The Dispensability of Judicial Review*, 86 YALE L.J. 1552 (1977).

15. See, e.g., Lewis B. Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 COLUM. L. REV. 847, 851 (1979); Saikrishna B. Prakash & John C. Yoo, *The Puzzling Persistence of Process-Based Federalism Theories*, 79 TEX. L. REV. 1459 (2001); Ilya Somin, *Taking Dissenting by Deciding All the Way Down*, 48 TULSA L. REV. 523, 532–33 (2013); John C. Yoo, *Sounds of Sovereignty: Defining Federalism in the 1990s*, 32 IND. L. REV. 27 (1998); John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311 (1997).

16. Gerken, *supra* note 11, at 11–18.

17. As is evident from the Court's most recent decisions, which even went so far as to constitutionalize the principle of interstate equality. See, e.g., *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2622 (2013) (recognizing states' "equal sovereignty"). The Court is joined by a handful of scholars. See *supra* note 15 (collecting sources).

18. The tradition dates back at least to Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1 (1950).

19. See *infra* text accompanying notes 217–220 (describing the work of Metzger); *infra* text accompanying notes 221–223 (describing the work of Professor Rosen).

20. See *infra* text accompanying notes 50–52.

aimed at safeguarding a well-functioning democracy.<sup>21</sup> Wechsler and his heirs have been quite explicit on this point,<sup>22</sup> and rightly so. While federalism scholars' ardent support of the states has sometimes led them to treat state power as an end unto itself,<sup>23</sup> that is a mistake. Federalism, properly understood, is an account of why state power is a useful means to achieve a well-functioning democracy.<sup>24</sup> The political safeguards of vertical federalism, then, are designed to preserve the right kind of relationship between the states and federal government, not to create a one-way ratchet in favor of state autonomy. So, too, the question can't be whether the political safeguards of *horizontal* federalism increase state power. The question is whether they preserve the right kind of relations among the states for them to play their important role in maintaining a healthy democratic system.

Given how these two tales diverge, it is not hard to see why a political-safeguards account has dominated debates over vertical federalism but has yet to emerge in the context of horizontal federalism. The basic tenets in the field push against leaving interstate friction to the free play of politics and push toward imposing an extensive system of judicial review. If you think spillovers and the friction they generate are an unmitigated problem, for instance, you want to stop them. Judicial review, of course, provides a level of finality and certitude that the rough and chaotic realm of politics cannot. Indeed, worries about finality may loom even larger in the context of horizontal federalism. When we trust the state and the federal government to play the game of politics in the vertical realm, we at least have a sense of the rules of the game since the federal government holds the national-supremacy trump card. But no state can lay claim to supremacy. Interstate conflicts, then, seem more likely to descend into the governance equivalent of the Wild West.<sup>25</sup>

Similarly, if you worry that spillovers intrude on state sovereignty, cross territorial lines, and compromise important democratic values, you will certainly demand a referee for interstate disputes, and your ideal referee will be a court. Judicial review is well suited to dealing with questions of sovereignty, drawing jurisdictional lines, and declaring a clear winner.

Political solutions, in contrast, tend to be muddy along all of these dimensions. They often rest on compromise, which means both sides have

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21. See Heather K. Gerken, *Federalism as the New Nationalism: An Overview*, 123 YALE L.J. 1889, 1891 (2014).

22. Wechsler emphasized that federalism itself is "like other elements of government, a means and not an end." Wechsler, *supra* note 1, at 552. Professors Baker, Young, and Kramer, all of whom took up Wechsler's mantle decades later, say precisely the same thing. Baker & Young, *supra* note 2, at 135 ("[W]e would be the first to concede that states' rights have no independent value; their worth derives entirely from their utility in enhancing the freedom and welfare of individuals."); Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 223 (2000) ("Federalism must be understood as a means rather than an end . . .").

23. See Gerken, *supra* note 21, at 1900.

24. See *id.* at 1893.

25. Many thanks to Justin Levitt for suggesting this point.

to give something up no matter how principled their cause. And the solutions only unfold over time through a messy, iterative, and often nonlinear process. That's why democratic solutions to democratic problems are rarely expressed in the grammar of sovereignty.

Finally, a bet on the political safeguards requires confidence that institutions other than courts—administrative agencies, Congress, NGOs, political parties, interstate organizations—can mitigate interstate conflict. If judges are the Obi-Wan Kenobi of horizontal federalism,<sup>26</sup> there's little point to a safeguards account.

In sum, we cannot fashion an argument in favor of the political safeguards of horizontal federalism until we develop a different tale about state-to-state relations. That narrative must (1) recognize the democratic possibilities associated with interstate friction; (2) acknowledge that sovereignty is no more to be had at the horizontal level than it is at the vertical level; and (3) place some trust in the ability of nonjudicial institutions to mediate interstate conflict. These are the foundations of a safeguards argument. While our focus is on the first claim, we also offer an initial take on the second and third. In each instance, we discuss both the nascent literature on horizontal federalism and the mature debate on vertical federalism, with an eye to bringing the former closer to the latter.

## II. THE CASE AGAINST SPILLOVERS

Worries about spillovers dominate the scholarship and case law on horizontal federalism.<sup>27</sup> Scholars believe that state laws that generate spillovers are an exception to Justice Brandeis's famous aphorism about the value of state laboratories of democracy: "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."<sup>28</sup> They seize on the often-ignored second half of his paean to state-based experimentation. Many commentators point out that

26. See *STAR WARS EPISODE IV: A NEW HOPE* (Lucasfilm & Twentieth Century Fox 1977) ("Help me, Obi-Wan Kenobi. You're my only hope.").

27. The exception to the rule seems to be Rosen's work on one subcategory of spillovers—the extraterritorial application of a state's law to citizens in another state. See Mark D. Rosen, *State Extraterritorial Powers Reconsidered*, 85 NOTRE DAME L. REV. 1133 (2010) [hereinafter Rosen, *State Powers*]; see also Mark D. Rosen, *From Exclusivity to Concurrence*, 94 MINN. L. REV. 1051, 1105–08 (2010) [hereinafter Rosen, *Exclusivity*] (discussing the same topic in the context of a large discussion on regulatory overlap). Rosen wasn't attempting to develop the type of affirmative account for spillovers that we offer here; he was making a sensible but more modest point about the reality of regulatory overlap and its effect on citizens in other states. Nonetheless, his status as an outlier is intriguing, and we discuss his work in greater detail below. See *infra* text accompanying notes 221–223.

28. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). See Erbsen, *supra* note 5, at 514 n.59; Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353, 1355 (2006); Michael S. Greve, *Laboratories of Democracy: Anatomy of a Metaphor*, AM. ENTERPRISE INST. (Mar. 31, 2001), <http://www.aei.org/outlook/politics-and-public-opinion/elections/laboratories-of-democracy/>.



spillovers do “pose risks to the rest of the country.”<sup>29</sup> So while any “single courageous State”<sup>30</sup> is welcome to “serve as a laboratory . . . [to] try novel and social experiments”<sup>31</sup> and then to try to *convince* other States to follow along, no State should be allowed to “shift[ ] cost[s] [onto] . . . out-of-state interests, or, as the economists would have it, impose[ ] externalities on others.”<sup>32</sup>

Academics and judges have thoroughly canvassed the threats that spillovers pose. These arguments are so familiar—and so commonsensical—that we will sketch them only briefly. Our aim, after all, isn’t to disprove these arguments but simply to show that they’re incomplete.

### A. *The Costs of Spillovers*

Concerns about spillovers can be grouped roughly into two categories: worries that spillovers undermine our economy and worries that they undermine our democracy.

#### 1. Spillovers and the National Economy

One of the greatest costs associated with spillovers is their potential to undermine the national marketplace. The traditional account begins with the observation that one of “the Framers’ purpose[s] [in adopting the Constitution was] to prevent a State from retreating into the economic isolation that had plagued relations among the Colonies and later among the States under the Articles of Confederation.”<sup>33</sup> On this view, the Commerce Clause was designed to eliminate “economic Balkanization.”<sup>34</sup> It’s easy to see why one might worry about economic spillovers. Competing or conflicting state regulations undermine the national market by robbing the nation of “the considerable benefits that flow from national regulatory uniformity and [by exposing] an increasingly unified national (and international) commercial market [to] the imposition of externalities by unfriendly state legislation.”<sup>35</sup>

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29. Issacharoff & Sharkey, *supra* note 28, at 1355.

30. *New State Ice Co.*, 285 U.S. at 311 (Brandeis, J., dissenting).

31. *Id.*

32. Issacharoff & Sharkey, *supra* note 28, at 1371.

33. *Dep’t of Revenue v. Davis*, 553 U.S. 328, 338 (2008) (quotations, citations, and alterations omitted).

34. *Id.*

35. Issacharoff & Sharkey, *supra* note 28, at 1356; *see also* *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 103 (1992) (opinion of O’Connor, J.) (explaining that state worker-safety legislation could not be “inconsistent with [a] federal scheme of establishing uniform federal standards”); *Healy v. Beer Inst.*, 491 U.S. 324, 335–36 (1989) (holding that application of Connecticut statute impacting commercial activity only outside of the state violated the Commerce Clause); *Edgar v. MITE Corp.*, 457 U.S. 624, 642 (1982) (opinion of White, J.) (precluding application of Illinois statute to commerce taking place outside Illinois’s borders due to its “direct restraint on interstate commerce”); Dan L. Burk, *Federalism in Cyberspace*, 28 CONN. L. REV. 1095, 1096–97 (1996) (arguing that multijurisdictional regulation and competition in internet regulation is “haphazard and uncoordinated”).



Businesses incur greater transaction costs from having to track and comply with multiple regulatory regimes. While the mere lack of uniformity between jurisdictions poses risks, two features of spillovers make matters worse. First, spillovers allow states to export some of the costs associated with their regulations,<sup>36</sup> which leads states to interfere more with free trade than they would if they fully internalized the cost of that decision.<sup>37</sup> Professor Greve may be the fiercest critic of what he terms interstate “exploitation.”<sup>38</sup> He warns, for instance, that the tort system and conflicts rules combine to license states to exploit the citizens of other states. “One cannot unshackle the states without allowing them to exploit each other,” he insists, and “[w]hatever values that monstrosity [of modern products-liability law] may serve, state autonomy is not one of them.”<sup>39</sup> Second, spillovers may expose a single course of conduct to inconsistent commands<sup>40</sup> that may be difficult, expensive, or impossible to satisfy simultaneously.<sup>41</sup>

## 2. Spillovers and Democracy

Other scholars worry that spillovers threaten our democracy. Some fear that they undermine national unity. Professor Zimmerman has offered the most comprehensive social-science account of interstate conflict, devoting an entire book to identifying the best means for promoting cooperative state relations.<sup>42</sup> Erbsen has offered the most detailed account of this concern on the law side, going so far as to catalogue eight sources of “constitutionally significant interstate friction.”<sup>43</sup> Nor are these scholars alone. The worry that the friction generated by spillovers can threaten national unity has become something of a trope in the literature.<sup>44</sup> In the worst case, the worry is that

36. See Burk, *supra* note 35, at 1128–30; E. Donald Elliott et al., *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 J.L. ECON. & ORG. 313, 329–30 (1985); Erbsen, *supra* note 5, at 523–24; Issacharoff & Sharkey, *supra* note 28, at 1422–23.

37. Jack L. Goldsmith & Allan O. Sykes, Essay, *The Internet and the Dormant Commerce Clause*, 110 YALE L.J. 785, 795–96 (2001).

38. Michael S. Greve, *Federalism’s Frontier*, 7 TEX. REV. L. & POL. 93, 95 (2002).

39. *Id.* at 106–07.

40. CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 88 (1987) (discussing recent Commerce Clause cases where the Court “invalidated statutes that may adversely affect interstate commerce by subjecting activities to inconsistent regulations” (citation omitted)); see also Donald H. Regan, Essay, *Siamese Essays: (I) CTS Corp. v. Dynamics Corp. of America and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation*, 85 MICH. L. REV. 1865, 1875 (1987).

41. Int’l Paper Co. v. Ouellette, 479 U.S. 481, 496 (1987) (discussing how application of state law outside the state would “undermine the important goals of efficiency and predictability”); see also Goldsmith & Sykes, *supra* note 37, at 786.

42. JOSEPH F. ZIMMERMAN, *HORIZONTAL FEDERALISM: INTERSTATE RELATIONS* (2011).

43. Erbsen, *supra* note 5, at 510.

44. See Ann O’M. Bowman, *Horizontal Federalism: Exploring Interstate Interactions*, 14 J. PUB. ADMIN. RES. & THEORY 535, 536 (2004) (the aim of horizontal federalism is minimizing conflict); Erbsen, *supra* note 5, at 502–03 (“[F]riction can flare out of control if left unchecked . . . undermin[ing] national stability.”); Fruehwald, *supra* note 2, at 329; Metzger, *supra* note 2, at 1478 (“national umpire over interstate relations is essential to ensure union”); Garrick B.

interstate tension will lead to violent confrontation, whether on a mass scale, as with the Civil War, or on a more limited basis, as with armed border skirmishes.<sup>45</sup>

Even tensions that do not escalate to violence are thought to be problematic. Some commentators, like Erbsen, worry that such tensions might encourage citizens to identify more with their state or region than with the nation and thus generate “entrenched regionally-defined factions that would undermine national stability” over time.<sup>46</sup> Others worry about maintaining interstate relations.<sup>47</sup> Metzger, for instance, argues that unchecked policymaking spillovers in “contexts of sharp public contestation” can threaten “interstate harmony.”<sup>48</sup> She writes, for instance, that “states’ fears that they would be forced to recognize same-sex marriages absent DOMA . . . could have led to interstate strife.”<sup>49</sup> Spillovers, then, bring to the fore all the worries about the centrifugal effects of federalism.

A number of scholars worry that spillovers violate a different set of democratic values: those having to do with state sovereignty.<sup>50</sup> As we detail in Part IV, sovereignty is a stand-in for a larger set of concerns about state autonomy, equality among the states, territoriality, and self-rule. These principles amount to something of a mantra in the horizontal federalism literature and are regularly invoked, separately and together, in much of the work on the subject even by those who don’t use the term *sovereignty*.<sup>51</sup> We see a

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Pursley, *Defeasible Federalism*, 63 ALA. L. REV. 801, 818–20 (2012) (discussing the role that the judiciary plays in ameliorating state friction at the horizontal level); Garrick B. Pursley, *Dormancy*, 100 GEO. L.J. 497, 518, 526–28 (2012) [hereinafter Pursley, *Dormancy*] (expressing worries about horizontal friction).

45. Erbsen notes the Framers’ worries about “frequent and violent contests” that undermine “peace” and “stability.” Erbsen, *supra* note 5, at 511–12 (quoting THE FEDERALIST No. 6, at 54 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

46. *Id.* at 522–23.

47. *E.g.*, Fruehwald, *supra* note 2, at 329; Laycock, *supra* note 7, at 263–64.

48. Metzger, *supra* note 2, at 1503. Metzger concludes that Congress is constitutionally empowered to address these problems. *Id.*

49. *Id.* at 1533; *see also* Fruehwald, *supra* note 2, at 329 (discussing the past and present concern that “interstate rivalry” be curtailed).

50. *See, e.g.*, Katherine Florey, *State Courts, State Territoriality, State Power: Reflections on the Extraterritoriality Principle in Choice of Law and Legislation*, 84 NOTRE DAME L. REV. 1057, 1115 (2009); Scott Fruehwald, *If Men Were Angels: The New Judicial Activism in Theory and Practice*, 83 MARQ. L. REV. 435, 492 (1999) (“Ignoring . . . general notions of horizontal federalism creates the danger that a state will exceed its sovereignty . . .”); Metzger, *supra* note 2, at 1513. Rosen is an exception. He argues that we have moved from a system where states regulated exclusively within their jurisdiction to one where states regulate “concurrently.” Rosen, *Exclusivity*, *supra* note 27, at 1105–08.

51. *See, e.g.*, Bowman, *supra* note 44 (discussing sovereignty and equality); Erbsen, *supra* note 5, at 507–10, 514–16, 527–28 (discussing all four concerns); Florey, *supra* note 50 (offering a comprehensive take on extraterritoriality); Patrick M. Garry et al., *Raising the Question of Whether Out-of-State Political Contributions May Affect a Small State’s Political Autonomy: A Case Study of the South Dakota Voter Referendum on Abortion*, 55 S.D. L. REV. 35, 40 (2010) (“[H]orizontal federalism reflects the view that each state must have a sufficient degree of independence and autonomy for other states.”); Michael S. Greve, *Choice and the Constitution*,

similar tendency within the doctrinal silos that fall within the ambit of horizontal federalism.<sup>52</sup> Spillovers impinge on state sovereignty by depriving a state of full control over its territorial domain.

These arguments also tap into a deeply intuitive concern about territoriality and self-rule. We worry about spillovers because they prevent citizens within a state from exercising control over their own destinies. In essence, spillovers allow the representatives of one state's citizens to tell another's what to do.<sup>53</sup>

## B. *The Doctrine*

### 1. The Supreme Court's Constitutional Cases

Just as worries about spillovers have dominated the scholarship on horizontal federalism, they have informed much of its doctrine as well.<sup>54</sup> As with the academic literature, the inner logic of the Court's doctrine is premised on a concern about spillovers.

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AM. ENTERPRISE INST. (Mar. 1, 2003), <http://www.aei.org/outlook/politics-and-public-opinion/judicial/choice-and-the-constitution/> (describing the fundamental principles guiding horizontal federalism: state equality, democratic self-rule, and "a presumption that state sovereignty must end at the borders"); David V. Snyder, *Molecular Federalism and the Structures of Private Lawmaking*, 14 IND. J. GLOBAL LEGAL STUD. 419, 432 (2007) (arguing that spillovers "[i]n democratic terms . . . reflect[ ] a lack of representation"); see also sources cited *infra* Section IV.A.

52. See Margaret Meriwether Cordray, *The Limits of Sovereignty and the Issue of Multiple Punitive Damages Awards*, 78 OR. L. REV. 275, 292–99 (1999) (calling for sovereignty-based, territorial limitations on punitive-damages awards); Greve, *supra* note 38, at 96–100 (arguing that horizontal federalism's tenets include "principles of state autonomy and equality," which require that "each state govern its own territory and citizens but not, of course, the territory and citizens of other states"); Laycock, *supra* note 7, at 250–53, 315–21 (arguing that states are not sovereign in the sense that countries are sovereign but relying on notions of state equality and territoriality to define a state's "semi-sovereign" status to understand choice-of-law issues); Jeffrey M. Schmitt, *A Historical Reassessment of Full Faith and Credit*, 20 GEO. MASON L. REV. 485 (2013) (offering a historical account of the Full Faith and Credit Clause that would place "territorial-based" limits on the ability of Congress to give a state's law extraterritorial effect); A. Benjamin Spencer, *Due Process and Punitive Damages: The Error of Federal Excessiveness Jurisprudence*, 79 S. CAL. L. REV. 1085, 1093 (2006) ("[T]he sovereign authority of states does not properly extend to the punishment of lawful extraterritorial activity within the federal system."); see also sources cited *infra* Section IV.A.

53. See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 421 (2003); *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 495 (1987); Cordray, *supra* note 52, at 308 (expressing concern when a state "projects its own regulatory choices . . . onto other states" and thereby "infring[es] on the policy choices of other States" (quoting *BMW v. Gore*, 517 U.S. 559, 572 (1996)) (internal quotation marks omitted)); Florey, *supra* note 50, at 1115 (one of the "ideological principles of federalism" is that "states are entitled to some autonomous sphere in which to make policy free of interference from other sovereigns").

54. A partial exception can be found in the case law arising under the Full Faith and Credit Clause, which is not surprising given the clause's text and purpose. See *infra* text accompanying notes 256–266.

a. *The Dormant Commerce Clause*

The Court has expressed its concern about spillovers most explicitly in its dormant Commerce Clause cases. The Court has focused much of its efforts on state laws that regulate extraterritorial conduct. *Edgar v. MITE Corp.* articulates the modern test. There, the Court struck down an Illinois antitakeover law that protected any corporation with certain kinds of ties to Illinois.<sup>55</sup> The Court found that the law had “a sweeping extraterritorial effect” and that, if other states also imposed such regulations, “interstate commerce in securities transactions generated by tender offers would be thoroughly stifled.”<sup>56</sup> The Court then articulated an extremely broad rule: “The Commerce Clause . . . precludes the application of a state statute to commerce that takes place wholly outside of the State’s borders, *whether or not the commerce has effects within the State.*”<sup>57</sup> This rule was justified because “any attempt ‘directly’ to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State’s power.”<sup>58</sup>

The Court elaborated on this rule in a series of price-affirmation cases, where the Court expressed deep misgivings about regulations whose “*practical effect . . . is to control conduct beyond the boundaries of the State.*”<sup>59</sup> The Court based its broad ruling on “the Constitution’s special concern both with the maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce and with the autonomy of the individual States within their respective spheres.”<sup>60</sup>

Related to the Court’s rule against extraterritoriality, the Court has also “invalidated statutes [under the Commerce Clause] that may adversely affect interstate commerce by subjecting activities to inconsistent regulations.”<sup>61</sup> The Court first articulated this principle in *CTS Corp.*, a successor case to *MITE Corp.*<sup>62</sup>

55. *Edgar v. MITE Corp.*, 457 U.S. 624, 631 (1982).

56. *Id.* at 642.

57. *Id.* at 642–43 (emphasis added).

58. *Id.* at 643 (quoting *Shaffer v. Heitner*, 433 U.S. 186, 197 (1977)).

59. *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989) (emphasis added). *Healy v. Beer Institute* struck down a statute that “t[ie]d Connecticut beer prices to the prices charged in border States” based in part on the way that “the challenged statute . . . interact[ed] with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation.” *Id.* at 326, 336. A statute failing this “practical effect[s]” test would be “invalid regardless of whether the statute’s extraterritorial reach was intended by the legislature.” *Id.* at 336.

60. *Id.* at 335–36 (footnote omitted).

61. *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 88 (1987); *see also Healy*, 491 U.S. at 336–37 (“[T]he Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State.”).

62. In *CTS Corp.*, the Court upheld a more narrowly drawn Indiana antitakeover statute that applied only to corporations incorporated under Indiana state law. *CTS Corp.*, 481 U.S. at 94. Critical to the Court was the fact that, “[s]o long as each State regulates voting rights only

The final line of dormant Commerce Clause cases dealing with spillovers arises under the *Pike* test, which applies to nondiscriminatory state regulations whose “effects on interstate commerce are only incidental.”<sup>63</sup> Under this test, which balances burdens on interstate commerce against “local benefits,”<sup>64</sup> the Court considers whether local aims “could be promoted as well with a lesser impact on interstate activities.”<sup>65</sup> Spillover concerns appear prominently in these cases.<sup>66</sup>

#### b. *The Due Process Clause*

The Court has also tried to contain spillovers under the Due Process Clause. *BMW v. Gore* struck down a large punitive-damages award based on evidence of conduct that was tortious in the forum state but lawful in the states where the conduct occurred.<sup>67</sup> Relying on “principles of state sovereignty and comity,” the Court explained that “a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors’ lawful conduct in other States.”<sup>68</sup> This rule follows from the principle that “one State’s power to impose burdens on the interstate market . . . is not only subordinate to the federal power over interstate commerce, but is also constrained by the need to respect the interests of other States.”<sup>69</sup> So, too, *State Farm Mutual Automobile Insurance Co. v. Campbell* struck down a large punitive-damages award that was based in part on evidence of out-of-state misconduct.<sup>70</sup> As Justice Kennedy explained, “a State [does not] have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the State’s jurisdiction” because to do so would prevent “each State [from] mak[ing] its own reasoned judgment about what conduct is permitted or proscribed within its borders.”<sup>71</sup>

Scholars have tried to push the Court in a similar direction for conflicts cases, which are also rooted in due process. Although these cases plainly

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in the corporations it has created, each corporation will be subject to the law of only one State.” *Id.* at 89.

63. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

64. *Id.*

65. *Id.*

66. A good example is *Kassel v. Consolidated Freightways Corp.*, where a plurality of the Court applied the *Pike* test to an Iowa law that “generally prohibit[ed] the use of 65-foot doubles [semitrucks on highways] within its borders.” 450 U.S. 662, 665 (1981) (plurality opinion). The impact of Iowa’s rule would have been quite significant since major interstate highways ran through Iowa. *Kassel*, 450 U.S. at 665. Besides fearing that Iowa’s law would burden the interstate trucking industry, the Court was concerned that the law would have imposed substantial costs on Iowa’s neighbors by increasing their truck traffic and/or overriding those neighbors’ policy choice to allow longer trucks. *Id.* at 671, 674–76.

67. *BMW v. Gore*, 517 U.S. 559, 571–74 (1996).

68. *Id.* at 572.

69. *Id.* at 571 (citation omitted).

70. 538 U.S. 408, 418–21 (2003).

71. *State Farm*, 538 U.S. at 421–22.

implicate horizontal federalism and state sovereignty<sup>72</sup>—indeed, they were once explicitly linked to such concerns<sup>73</sup>—the Court has recast them in the language of individual rights.<sup>74</sup> While most commentators think of this doctrinal shift as proof of the shortcomings of the sovereignty model,<sup>75</sup> some have urged the Court to return personal jurisdiction and choice of law to their territorial and sovereignty-based roots because of the same spillover worries that dominate the analysis of horizontal federalism’s other doctrinal silos.<sup>76</sup>

## 2. The Supreme Court’s Statutory Cases

Concern about spillovers has also influenced the Court’s statutory preemption cases. In *Ouellette*, the Court held that the Clean Water Act implicitly preempted a Vermont plaintiff’s nuisance claim against a New York

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72. Even setting aside the most obvious vestiges of a sovereignty approach, *e.g.*, *Burnham v. Superior Court*, 495 U.S. 604 (1990) (plurality opinion), worries about spillovers, sovereignty, and horizontal relations often implicitly (and sometimes explicitly) inform the Court’s assessment of what process is owed a citizen who is subject to the jurisdiction or laws of another state. *See, e.g.*, *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Hanson v. Denckla*, 357 U.S. 235 (1958). For detailed analyses and vigorous critiques of this aspect of the Court’s jurisprudence, *see*, for example, Robert H. Abrams & Paul R. Dimond, *Toward a Constitutional Framework for the Control of State Court Jurisdiction*, 69 MINN. L. REV. 75 (1984); Patrick J. Borchers, J. McIntyre Machinery, Goodyear, and the Incoherence of the Minimum Contacts Test, 44 CREIGHTON L. REV. 1245 (2011); Daan Braveman, *Interstate Federalism and Personal Jurisdiction*, 33 SYRACUSE L. REV. 533 (1982); John N. Drobak, *The Federalism Theme in Personal Jurisdiction*, 68 IOWA L. REV. 1015, 1050 (1983); Harold S. Lewis, Jr., *A Brave New World for Personal Jurisdiction: Flexible Tests Under Uniform Standards*, 37 VAND. L. REV. 1 (1984); Harold S. Lewis, Jr., *The Three Deaths of “State Sovereignty” and the Curse of Abstraction in the Jurisprudence of Personal Jurisdiction*, 58 NOTRE DAME L. REV. 699 (1983); Martin H. Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 NW. U. L. REV. 1112, 1113–14, 1117–20 (1981).

73. *Pennoyer v. Neff*, 95 U.S. 714 (1877).

74. *See, e.g.*, *Int’l Shoe Co. v. Washington*, 326 U.S. 310 (1945).

75. *See supra* note 72.

76. For an overview of some of this work and one of the most recent contributions to it, *see* Florey, *supra* note 50. *See also* Erbsen, *supra* note 5; Austen L. Parrish, *Sovereignty, Not Due Process: Personal Jurisdiction over Nonresident Alien Defendants*, 41 WAKE FOREST L. REV. 1 (2006); Stephen E. Sachs, *How Congress Should Fix Personal Jurisdiction*, 108 NW. U. L. REV. (forthcoming 2014) (manuscript at 12–13); A. Benjamin Spencer, *Jurisdiction to Adjudicate: A Revised Analysis*, 73 U. CHI. L. REV. 617 (2006); Allan R. Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction*, 65 TEX. L. REV. 689 (1987); Margaret G. Stewart, *A New Litany of Personal Jurisdiction*, 60 U. COLO. L. REV. 5 (1989); Arthur M. Weisburd, *Territorial Authority and Personal Jurisdiction*, 63 WASH. U. L.Q. 377 (1985). For signs that at least some of the justices are likely to be sympathetic to such an approach, *see* an opinion recently penned by Justice Kennedy, *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2789 (2011). For a vigorous rejection of efforts to return personal jurisdiction to its federalism and sovereignty roots, *see* sources cited *infra* in note 72. For an effort to find a middle ground, *see* John T. Parry, *Due Process, Borders, and the Qualities of Sovereignty—Some Thoughts on J. McIntyre Machinery v. Nicastro*, 16 LEWIS & CLARK L. REV. 827, 852–60 (2012).



polluter that had discharged pollutants into Lake Champlain.<sup>77</sup> Notably, the Court found that the Act allowed the suit to proceed under New York nuisance law but not under Vermont law.<sup>78</sup> Allowing a nuisance suit to proceed under Vermont law “could effectively override . . . the policy choices made by [New York].”<sup>79</sup> And this would empower “Vermont and other States [to] do indirectly what they could not do directly—regulate the conduct of out-of-state sources.”<sup>80</sup> The Court feared that this “chaotic regulatory structure” would subject polluters to multiple, inconsistent regulations.<sup>81</sup>

Worries about inconsistent regulation of the same conduct also inform cases like *CTS Corp.*<sup>82</sup> The Court has broadened this rationale in more recent cases in order to protect corporations from having to comply with what has sometimes been characterized as a “crazy-quilt”<sup>83</sup> of requirements set by fifty different states. Critics of spillovers have convincingly argued that this preference for uniformity relates to spillovers as well. Consider Professor Issacharoff and Professor Sharkey’s analysis:

[M]ost products are mass produced and mass distributed, without any clear sense of where in the national market they might end up . . . . The upshot is that most manufacturers design and market uniform products rather than different products for each state and, correspondingly, design their products to the specifications of the largest states or to the jurisdiction with the most stringent liability standards . . . .<sup>84</sup>

The Court relied on just this uniformity rationale in *Gade v. National Solid Wastes Management Association*.<sup>85</sup> Invoking concerns about both horizontal and vertical uniformity, the Court read the Occupational Safety and Health Act to require that states obtain approval from the Secretary of Labor before adopting workplace safety standards that were more stringent than the federal floor.<sup>86</sup> Uniformity concerns have also animated several recent Court opinions on the preemption of state tort suits.<sup>87</sup>

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77. *Int’l Paper Co. v. Ouellette*, 479 U.S. 481, 500 (1987).

78. *Id.* at 497.

79. *Id.* at 495.

80. *Id.* According to the Court, the Clean Water Act permits states to set stricter discharge standards than required by federal law, but it reserves that power *only* to the source state. *Id.* at 499.

81. *Id.* at 497.

82. See Regan, *supra* note 40, at 1880 (discussing how at least some of the justices were concerned about “inconsistent regulations”).

83. *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 448 (2005) (rejecting the defendants and federal government’s argument that the regulations represented a “crazy-quilt” of requirements).

84. Issacharoff & Sharkey, *supra* note 28, at 1385–86.

85. 505 U.S. 88 (1992).

86. *Gade*, 505 U.S. at 108.

87. For example, in *Riegel v. Medtronic, Inc.*, the Court speculated that Congress meant for the Federal Food, Drug, and Cosmetic Act’s express preemption clause to prohibit tort suits against certain medical-device manufacturers out of “solicitude for those who would suffer without new medical devices if juries were allowed to apply the tort law of 50 States to



### C. *Spillunders*

Worries about spillovers are so dominant in law that we don't even have a term—let alone a full-fledged literature—on the opposite but equally important problem of what we term *spillunders*. If you care about state power, after all, you should worry not just about states' shielding their residents from other states' laws (spillovers) but also about state laws' being denied an appropriate extraterritorial reach (spillunders).

Think for a moment about same-sex marriage. The conventional worry in horizontal federalism, with its focus on territoriality and sovereignty, is that states that favor marriage equality will impose that preference on states that don't. But it might be just as important to a state to have the same-sex marriages it has blessed recognized outside of its territory. Similarly, as we describe below,<sup>88</sup> the evolution of the Court's personal-jurisdiction doctrine has as much to do with spillunders as spillovers. The Court's early cases were preoccupied with territorial boundaries and the threat spillovers posed to state power. That approach resulted in an underenforcement problem, making it difficult for a state to enforce its own laws against out-of-state citizens who committed harms while passing through the state or against out-of-state companies doing business in the state. And a whole book could be written about the problem of spillunders with regard to the evasion of familial responsibilities, such as the failure to pay child support.<sup>89</sup>

These issues are well-known and make clear that horizontal federalism depends as much on how we deal with spillovers as spillunders. And yet only one of these problems has a name, let alone an academic pedigree.

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Spillovers, in sum, have no fans in the judiciary or the academy. Judges put a stop to a number of them, with scholars making the case for them to do more.

### III. THE AFFIRMATIVE CASE FOR SPILLOVERS

The scholarly and judicial hostility toward spillovers is interesting both as a descriptive and prescriptive matter. As a purely descriptive matter, if you

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all innovations.” 552 U.S. 312, 326 (2008) (emphasis added). Similarly, Justice Thomas, dissenting for four justices in *Altria Group, Inc. v. Good*, argued that the express preemption clause of the Federal Cigarette Labeling and Advertising Act should preempt smokers' state fraud claim regarding the marketing of light and low-tar cigarettes because “whether marketing a light cigarette is ‘misrepresentative’ . . . would almost certainly be answered differently from State to State . . . [which] will inevitably result in the nonuniform imposition of liability.” 129 S. Ct. 538, 561 (Thomas, J., dissenting) (quoting *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 553 (1991) (Scalia, J., concurring in part and dissenting in part) (internal quotation marks omitted)).

88. See *infra* text accompanying notes 248–253.

89. See Estin, *supra* note 6, at 302 (discussing horizontal federalism in the context of child-support disputes); *infra* notes 235, 255 and accompanying text.

worry about spillovers, there's a lot to worry about.<sup>90</sup> Spillovers are an absolutely routine phenomenon in a partially decentralized, highly integrated system like our own. They occur when California passes climate-change legislation and car manufacturers in other states are forced to manufacture cars that emit fewer greenhouse gases in order to sell in the California market.<sup>91</sup> Or when New York courts must decide whether a same-sex couple married in Massachusetts but now living in New York is legally married under New York state law.<sup>92</sup> Or when Texas adopts a statewide curriculum that questions evolution and school boards around the country must decide whether to buy textbooks tailored to one of the nation's largest single textbook purchasers.<sup>93</sup> Or when Vermont requires in-state retailers to disclose the use of human-growth hormone and milk producers nationwide must decide whether to change their farming practices lest they scare off an entire state's consumers.<sup>94</sup> Or when Wisconsin refuses to contract with businesses that have violated federal labor law anywhere in the country and companies that hope to compete for Wisconsin's contracts must change their practices elsewhere.<sup>95</sup> Or when New York City sues Georgia gun dealers under New York state tort law and out-of-state dealers must adapt their sales practices to avoid liability.<sup>96</sup> The list goes on and on.

The very effort to define spillovers makes clear how ubiquitous they are. Spillovers are to law professors as pornography is to judges: we know it when we see it.<sup>97</sup> Most scholars don't even bother to define what a spillover is, and it's hard to find a theoretically durable and intellectually satisfying definition anywhere in the literature.<sup>98</sup>

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90. Metzger, *supra* note 2, at 1521 ("In practice, states exert regulatory control over each other all the time."). Scholars of horizontal federalism routinely mourn this fact. See, e.g., Erbsen, *supra* note 5, at 496–97; Fruehwald, *supra* note 2, at 327–31.

91. E.g., *Cent. Valley Chrysler-Jeep, Inc. v. Goldstene*, 529 F. Supp. 2d 1151, 1155–57 (E.D. Cal. 2007), *aff'd on reh'g*, 563 F. Supp. 2d 1158 (E.D. Cal. 2008); *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295, 300–03 (D. Vt. 2007).

92. E.g., *Godfrey v. Spano*, 920 N.E.2d 328, 337 (N.Y. 2009) (Ciparick, J., concurring); see also *Martinez v. Cnty. of Monroe*, 850 N.Y.S.2d 740, 741–42 (App. Div. 2008) (dealing with a similar problem when the other jurisdiction is not a U.S. state but a Canadian province).

93. See DIANE RAVITCH, *THE LANGUAGE POLICE* 71–72, 98–107 (2003).

94. *Int'l Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67, 69–70 (2d Cir. 1996).

95. *Wis. Dep't of Indus., Labor & Human Relations v. Gould, Inc.*, 475 U.S. 282, 283–85 (1986).

96. New York City, concerned that lax enforcement outside of New York was creating a market in which illegal guns were flooding the city, conducted a sting operation in Georgia and elsewhere and then filed suit against gun dealers in those states. See *Amended Complaint, City of New York v. A-1 Jewelry & Pawn, Inc.* (E.D.N.Y. Sept. 6, 2007) (No. 06 CV 2233), 2007 WL 2739888.

97. With apologies to Justice Stewart. See *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

98. It's even difficult to define them *ex ante*. Consider the debate over the role that immigrants play in local economies. When Arizona's anti-immigrant policies drive them to other states, is it helping or hurting those states? One state's unwelcome spillover is another's positive externality.

There's a reason for that. Almost any state activity causes spillovers. Economic spillovers are, of course, the favorite target of academics, and with good reason. But they are very hard to define rigorously. After all, if a farmer growing wheat for personal consumption can affect the national economy,<sup>99</sup> then surely economic regulations passed by one state can affect its neighbors.

If you move from the realm of economics to politics, the lesson still holds. When a state regulates workplace safety or legalizes casinos or marries same-sex couples or fails to regulate air pollution, those policies affect people out of state. Even when state policies are confined within a state's borders, they can generate what one might call "psychic" or "cultural" or "political" spillovers because people worry that those policies will influence the national debate. Think about recent fights over same-sex marriage or public unions or immigration laws. When a state moves on these fronts, outside money often pours into the legislative fights. It's not because people elsewhere think that those regulations will have an immediate effect on their own lives. It's because they fear that these efforts will eventually lead to the imposition of a *national* policy. At the very least, they worry that the mere existence of the policy in some part of the country is inconsistent with their understanding of national identity.<sup>100</sup>

Precisely because spillovers are ubiquitous in our tightly networked economic and political system, scholars who write about spillovers don't try to draw clean distinctions between state policies that affect out-of-state residents and those that do not. One might be tempted to confine one's definition of spillovers to out-of-state effects that carry the force of one state's law (such as when same-sex couples married in one state move to another or when one state's tort law is applied to citizens of another state). But this definition would fail to capture many phenomena routinely termed "spillovers" in the literature, many of which stem from the absence of regulation (e.g., the way Georgia's failure to regulate guns affects New York City's efforts to limit them, or the way Ohio's failure to regulate air emissions affects residents of West Virginia). Rather than look to formal categories, law professors make the problem manageable by imbuing the term with some normative weight, focusing on state policies that are both *unwelcome* to residents of other states<sup>101</sup> and have *enough* of an extraterritorial effect for us to notice them.<sup>102</sup> We know it when we see it.

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99. *Wickard v. Filburn*, 317 U.S. 111 (1942).

100. Thanks to Jonathan Meltzer and Ted Ruger for suggesting this point. Professor Cunningham-Parmeter's work on state-level immigration policies provides a good example of how many types of spillovers occur even within a single domain. He argues that immigration policies inflict economic and policy spillovers on other states as well as shape our "shared national identity." See Cunningham-Parmeter, *supra* note 6, at 1714–23.

101. Law professors have learned the economists' lesson that state activities can generate positive externalities for other states, which is precisely why they focus on unwelcome effects. See *supra* text accompanying notes 9–10. Otherwise, *everything* would be a spillover.

102. Note the irony here. Politics, of course, is often what tells us when a cross-state effect is sufficiently important and undesirable to constitute a "spillover," and yet those who use this

Even setting aside the descriptive observation—that spillovers are ubiquitous—scholarly hostility to spillovers is interesting as a *prescriptive* matter because it stands in stark contrast to the core commitments of vertical federalism. Spillovers occur just as routinely in vertical federalism as they do in horizontal federalism. Indeed, most federalism cases amount to turf wars between the states and the federal government, each seeking to regulate where the other thinks its policies ought to prevail.

But while horizontal federalism deplores the friction that spillovers generate, vertical federalism celebrates it. It's not just that academics tolerate state–federal tussles because they are the natural consequence of an integrated national system. Instead, scholars often laud friction as an essential part of a well-functioning democracy. No one favors all forms of friction at all costs. But many people do believe that *some* conflict between the state and federal governments is healthy. The goal in vertical federalism, then, is not to suppress friction but to harness it.<sup>103</sup> In horizontal federalism, in sharp contrast, worries about the interstate frictions run so deep that some even think that preventing friction is part of the very definition of horizontal federalism.<sup>104</sup>

You might dismiss the comparison on the ground that we value state–federal friction for reasons that are irrelevant to relations among the states. We celebrate state resistance at the vertical level because it wards off a national Leviathan and checks an overweening federal government.

Fair enough. Keeping the federal government within its bounds is surely the main reason we value state–federal friction. But there are others, all of which have to do with maintaining a healthy democracy and creating democratic spaces where the minority and majority can interact. States are important in a federal scheme because they can “dissent by deciding”—state policymakers can challenge national policy not by writing an editorial or organizing a march (the tools conventionally deployed by dissenters) but by offering a real-life instantiation of an idea.<sup>105</sup> State power exercises a gravitational pull on racial minorities and dissenters, pulling them into the project of governance and giving them a stake in its success.<sup>106</sup> States are sites where

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flexible definition tend to denigrate the role that politics plays in horizontal federalism. Thanks to Bryn Williams for suggesting this point.

103. Another way to characterize the two fields is that they draw different lines between tolerable and intolerable friction or depend on different assumptions about what kind of friction is acceptable. We think the basic point here still holds if the problem is reframed in this fashion, but we are grateful to Allan Erbsen for suggesting the idea.

104. Erbsen, for instance, argues that horizontal federalism should be understood as a “set of constitutional mechanisms for preventing or mitigating interstate friction that may arise from the out-of-state effects of in-state decisions.” Erbsen, *supra* note 5, at 503.

105. See Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745 (2005).

106. See Gerken, *supra* note 11, at 44–71.

the opposing party can coalesce into what Young depicts as shadow governments,<sup>107</sup> where political parties can wage their battles,<sup>108</sup> where local officials can monitor federal officials and train the loyal opposition,<sup>109</sup> and where dissenters can model policymaking alternatives to the dominant national view.<sup>110</sup> States can help us work through divisive issues, “keep[ing] open the capacity for change, so that law and policy can reflect and channel the variable rather than linear nature of public morality on most questions.”<sup>111</sup> When states clash with the federal government, they ensure that conventional wisdoms are challenged and policies are justified.<sup>112</sup> State contestation also plays a particularly important role in generating the democratic churn necessary to ensure that national policymaking doesn’t ossify.<sup>113</sup> For all of these reasons, the work on vertical federalism is aimed at maintaining a healthy level of state–federal friction while ensuring that the polity remains a polity.

The same cannot be said for the work on horizontal federalism. The ubiquitous goal is to suppress friction, not celebrate it. And given that scholars view friction as a bug rather than a feature of “Our (Horizontal) Federalism,” their prescriptive arguments all but write themselves.

As a result, we see the theoretical equivalent of a one-way ratchet—lots of arguments for doing more to suppress friction but almost no arguments for letting interstate conflicts run their course. To be sure, some scholars are willing to tolerate low-level friction.<sup>114</sup> But that tolerance is begrudging, premised not on the idea that interstate friction can be useful but on the notion that some forms are too costly to suppress. If courts and scholars could limit

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107. See Ernest A. Young, *Welcome to the Dark Side: Liberals Rediscover Federalism in the Wake of the War on Terror*, 69 BROOK. L. REV. 1277, 1285–87 (2004); see also Merritt, *supra* note 4, at 7.

108. See generally Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077 (2014) (arguing that states check the federal government by channeling partisan conflict through federalism’s institutional framework).

109. See Akhil Reed Amar, *Some New World Lessons for the Old World*, 58 U. CHI. L. REV. 483, 503–05 (1991); Baker & Young, *supra* note 2, at 137–38.

110. See Young, *supra* note 107, at 1285–87.

111. Cristina Rodríguez, *Federalism and National Consensus* 62 (Oct. 6, 2013) (unpublished manuscript) (on file with the University of California, Berkeley, School of Law), available at <http://www.law.berkeley.edu/files/RodriguezFederalismandNationalConsensus10.14.pdf>.

112. See generally Amar, *supra* note 109, at 499–504 (summarizing three ways in which federalism checks the federal government).

113. See Gerken, *supra* note 11, at 60–71.

114. Greve, for instance, insists that “[a]ny federal system has to live with . . . regulatory spillovers” even while acknowledging that such a system can “control excessive spillovers.” GREVE, *supra* note 5, at 307. Similarly, Erbsen briefly suggests that “[f]riction-inducing behavior can be tolerable, or even desirable,” because some forms of friction are too “minor” to bother with or because “diversity between state regulatory approaches is an inevitable consequence of federalism” or because “antagonizing some states by discriminating against their interests can—if done under federal supervision—avoid even greater friction.” Erbsen, *supra* note 5, at 513–14. So, too, Metzger believes that interstate discrimination may be appropriate when one state is resisting the spillovers associated with another’s policy—in other words, engaging in self-help—although even here her core goal is to prevent spillovers. Metzger, *supra* note 2, at 1479, 1501.

every state policy to its own territorial limits, we suspect most would do so in a heartbeat.

It's possible that no one has bothered to develop such an account because interstate friction has no role to play in a healthy democratic system. We take the opposite view. Our case rests on more than the claim that interstate friction is a symptom of a healthy democracy rather than a disease unto itself. While we make that argument in Part III, our aims are more ambitious. We hope to show that interstate friction can play a roughly comparable role to that played by state–federal friction in promoting our nation's democratic health.<sup>115</sup> What follows is an initial cut on that claim.

#### A. *The Source of the Problem: Division or Inertia?*

In order to see the case for spillovers, it's helpful to begin with a question: What sort of worry do those who oppose spillovers have in mind? Remember that spillovers come in many flavors. Some involve substantial economic costs, and some don't. Some are highly salient (morally, culturally, politically), and some aren't. Mapping these categories gives you a sense of where they fit in the literature.

TABLE 1.  
HIGH COSTS AND LOW COSTS

	High Salience	Low Salience
High Economic Costs	1. California's emissions regulations; Georgia's lax gun enforcement; certain immigration policies	2. The type of rent-seeking legislation often struck down under the dormant Commerce Clause
Low Economic Costs	3. Same-sex marriage; English-only laws; Texas's efforts to rewrite textbooks in a more conservative direction	4. Most other state laws

### 1. Classifying Spillovers

Scholars who write about economic spillovers focus on Boxes 1 and 2—those involving high economic costs.<sup>116</sup> They worry about the weapons that

115. We recognize that we can't fully defend this account in a single article—perhaps ever, given the endogeneity problem. Ours is a system in which some spillovers have been suppressed, but spillovers aplenty remain. If you think the current system is working, it's hard to know whether that's because we've done a good job of cabining spillovers and ought to cabin more or because spillovers aren't as damaging as some fear they are. Unfortunately, the Good Lord has not provided us with a parallel universe in which to run the experiment necessary to determine who is right.

116. For an example of some of the best recent work on this subject, see Issacharoff & Sharkey, *supra* note 28, at 1356 (discussing how the Supreme Court has “attempted to capture the considerable benefits that flow from national regulatory uniformity and to protect an increasingly unified national (and international) commercial market from the imposition of externalities by unfriendly state legislation”).

states wield in interstate trade wars and the policies that erode the conditions for national commerce.

Economically costly spillovers are not the only ones that scholars seek to cabin, however. While some worry about policy spillovers with high economic costs, others wring their hands about spillovers that are highly salient in the political realm (Boxes 1 and 3).<sup>117</sup>

Some economic spillovers fit this category. California's emissions regulations, for instance, are both costly to American business and salient in the political realm. Indeed, their political salience may even rise with their economic costs.<sup>118</sup> After all, it's not just environmental types who care about California's emissions standards; it's also powerful interest groups in the auto industry.

Spillovers that are economically costly can also be of low salience to everyday citizens. Much of the courts' dormant Commerce Clause docket fits in this category. It may be costly, for example, if a state requires curved mudguards instead of straight ones for trucks that pass through its territory.<sup>119</sup> But the few people who sit up late at night worrying about their state's mudguard policy are unlikely to find partners at a cocktail party, let alone in the political arena. Conventional rent-seeking legislation imposes costs on outsiders, but it's rarely the stuff of political drama.

High-salience spillovers matter even when they impose minor costs on out-of-state residents. Recognizing same-sex marriages performed out of state obviously involves some administrative costs. But that's not what gets people agitated. It's the moral or cultural or psychic costs associated with their state's acknowledgment of these marriages that makes the marriages salient. So, too, when Texas revises its textbooks in order to convey a socially conservative view, residents of blue states must choose between purchasing mass-market textbooks whose worldview they reject or paying more for their preferred educational message by purchasing from smaller presses.<sup>120</sup> Here again, the issue is salient, but the associated economic costs are modest.

Scholars' arguments against high-salience spillovers rest not on claims about national markets or economic efficiency but on notions of sovereignty, territoriality, and self-rule.<sup>121</sup> Indeed, some scholars—particularly the ones interested in developing a transsubstantive account of horizontal federalism—find these high-salience spillovers to be just as troubling as economically costly ones.<sup>122</sup>

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117. *E.g.*, Erbsen, *supra* note 5 (on regional conflict); Metzger, *supra* note 2 (on DOMA).

118. Thanks to Ben Moskowitz for suggesting this point.

119. *Bibb v. Navajo Freight Lines*, 359 U.S. 520, 525 (1959).

120. *See supra* note 93 and accompanying text.

121. *See supra* notes 50–52; *infra* Section IV.A.

122. This point is made evident by the fact that the scholars we're discussing here lump the two together as if they were equivalent. Other scholars, in sharp contrast, confine their attacks on spillovers to the economic context. *E.g.*, Issacharoff & Sharkey, *supra* note 28.



These scholars seem to have a distinct picture in mind. They worry about chaos and conflict. They fear that the issues that split the states are divisive enough to exercise a centrifugal effect on the polity. On this view, states are a tool for maintaining peace between political camps because they let political foes control their own policymaking enclaves.

Those who favor policing high-salience spillovers place special emphasis on the principles of sovereignty, territoriality, and self-rule for good reason. All three, of course, are necessary to cabin warring factions and maintain the policymaking enclaves on which (they think) national unity depends. But these principles are also normative goods unto themselves. Little wonder that so many believe that we should suppress conflict, confine state policies within territorial boundaries, preserve regulatory enclaves, and ensure that majorities within each state are able to regulate entirely as they see fit without interference from their neighbors.

## 2. Balancing the Costs and Benefits

It is here that we depart most substantially from the emerging scholarly consensus. The literature treats politically salient spillovers in much the same way as it treats economically costly ones—as if they involved all costs and no benefits. We do not. We think the case for regulating low-salience, economically costly spillovers (Box 2 in our matrix) is easy. The democratic benefits are small, and the economic costs are high. There will often be good reason to regulate even high-salience spillovers when the economic costs are steep enough (Box 1), although here our account complicates the cost–benefit analysis.

We take a quite different view of high-salience spillovers (Boxes 1 and 3) than most scholars who write in this area. To begin with, we are skeptical that run-of-the-mill spillovers are likely to split the polity. Slavery was an issue that split the polity. But for the last several decades—arguably, for the last century—interstate spillovers have been quite prevalent, and yet no one has worried about secession. High-salience spillovers may be a source of annoyance, even anger, but they aren't the sort of conflict of which civil wars are made. We thus assume the nation is sufficiently unified to withstand a fair amount of interstate brouhaha. Friction, of course, has its costs even when national unity is not at stake; a well-functioning national system can still suffer death by a thousand cuts. But here, again, even in the face of pervasive spillovers, we've plainly muddled through.

We don't premise our affirmative case for spillovers solely on the notion that worries about interstate friction are overstated. That premise would simply counsel in favor of letting more of them go unregulated. Our claim, however, is that interstate friction engenders important democratic benefits. That's because we worry not just about instability but stasis—not just about conflict but its absence.

### 3. The Costs of a Frictionless System: Undermining National Politics

We all know that friction can be costly, but we miss the fact that a frictionless system comes with its own costs. There will be times when the enclave solution is too easy—when national elites have every incentive to relegate tough questions to local decisionmakers rather than forge a compromise at the national level. One might sensibly worry that certain issues—immigration, guns, gay rights—never get on the national agenda because national elites have no incentive to dip into the controversy. They are reluctant to talk about these issues precisely because they *are* important to everyday citizens.

You might ask why we should care if national elites duck an issue. Why not just let every enclave resolve the issue for itself? Here our arguments are animated by the view that federalism ought to exercise a centripetal rather than a centrifugal force on the polity<sup>123</sup>—that federalism should push us toward a national consensus on issues that matter to its people, not license politicians (or their constituents) to take the easy out. National politicians ought to be doing the hard work of democratic compromise rather than pawning off these decisions on their local brethren. Everyday Americans should be forced into the most honorable but least fun of democratic activities: compromise. It was too easy to let states in the Jim Crow South resolve questions of racial equality by themselves. It's been too easy for the national government to let states navigate the hard questions raised by gun rights and gay rights. Red and blue silos, policymaking enclaves, national policy amounting to nothing more than a series of exceptions—these phenomena, in our view, are not the products of a well-functioning democracy.

The national consensus need not be uniform. It might well be that we ultimately conclude that some exceptions to the national norm are acceptable. Some think that's what liberalism is all about.<sup>124</sup> But “checkerboard policies”<sup>125</sup> shouldn't depend entirely on self-interest and inertia.<sup>126</sup> They should be adopted only after we've had the type of debate that national politicking alone can drive.

Although one of us has written at length about the relationship between federalism and dissent,<sup>127</sup> here our main concern is less with the dissenting minority than with the diffuse majority. As Professor Ackerman, among

123. For an effort to develop this sort of nationalist account for vertical federalism, see Gerken, *supra* note 11, at 44–73.

124. E.g., MICHAEL WALZER, *OBLIGATIONS: ESSAYS ON DISOBEDIENCE, WAR, AND CITIZENSHIP* 12 (1970) (arguing that “the historical basis of liberalism is in large part simply a series of [ ] recognitions” of “the claims of smaller groups” for exemptions from general rules).

125. RONALD DWORKIN, *LAW'S EMPIRE* 179 (1986).

126. We recognize that this is an entirely debatable premise. As Rosen observes, “pluralism is *hard*, and why should the dissenting minority need issue-by-issue approval from the majority anyway?” Email from Mark Rosen, Professor of Law, Chi.-Kent Coll. of Law, Ill. Inst. of Tech., to Heather Gerken, J. Skelly Wright Professor of Law, Yale Law Sch. (July 15, 2013, 1:01 PM EDT) (on file with author).

127. See Gerken, *supra* note 11; Gerken, *supra* note 105.

others, has pointed out, those concerned with the health of our democracy should worry not just about discrete and insular minorities but about diffuse and anonymous majorities as well.<sup>128</sup>

There are times when national gridlock prevents the majority from persuading politicians to entertain their concerns, let alone implement their policies. Examples abound. Immigration is a perennial worry for Americans, but national politicians have treated it as something of a third rail. Similarly, even in the wake of DOMA's demise, the odds of Congress addressing marriage equality are slim. Indeed, if you survey Congress's work over the last decade, it's failed to pass major legislation in a wide variety of areas that are highly salient to the American people. That's even true of economic legislation, despite its extraordinary importance in politics. We shouldn't have to wait for the imminent collapse of the banking system to get something done in Washington.

National gridlock is the product of two things. The first is political: national politicians lack incentives to dive into a controversial area. The second is structural: the thicket of constitutional and subconstitutional procedural barriers to legislation. The lawmaking process is filled with vetogates—opportunities for small groups of legislators to block or slow legislation. A small and dedicated minority perched atop a vetogate can block even broadly popular legislation.

We worry not just about diffuse majorities but about latent ones as well. In many instances, people's views on important issues are simply inchoate, even unformed.<sup>129</sup> A majority cannot coalesce without the help of political elites serving as “conversational entrepreneurs”<sup>130</sup> and political controversies serving as lightning rods. Both help frame issues and elicit voter preferences.<sup>131</sup>

National elites have a huge advantage over their local counterparts in helping a majority view coalesce. People pay more attention to national politics. Few things do more to convert latent majorities into real ones than

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128. Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985).

129. It is for this reason that E.E. Schattschneider argued that the ability to define a problem and its solution “is the supreme instrument of power.” E.E. SCHATTSCHNEIDER, *THE SEMI-SOVEREIGN PEOPLE: A REALIST'S VIEW OF DEMOCRACY IN AMERICA* 68 (1975).

130. ROBERT W. BENNETT, *TALKING IT THROUGH: PUZZLES OF AMERICAN DEMOCRACY* 37 (2003).

131. Within the legal academy, Professor Kang has done some of the best work in this area. See, e.g., Michael S. Kang, *Race and Democratic Contestation*, 117 YALE L.J. 734 (2008). In the realm of social science, the literature builds on the work of Erving Goffman. See ERVING GOFFMAN, *FRAME ANALYSIS: AN ESSAY ON THE ORGANIZATION OF EXPERIENCE* (1974). For a sampling of this literature, see, for example, FRANK R. BAUMGARTNER & BRYAN D. JONES, *AGENDAS AND INSTABILITY IN PUBLIC POLICY* (1993); SHANTO IYENGAR & DONALD R. KINDER, *NEWS THAT MATTERS: TELEVISION AND AMERICAN OPINION* (1987); WILLIAM H. RIKER, *THE ART OF POLITICAL MANIPULATION* (1986); DEBORAH A. STONE, *POLICY PARADOX AND POLITICAL REASON* (1988); Dennis Chong & James N. Druckman, *Framing Theory*, 10 ANN. REV. POL. SCI. 103 (2007); James N. Druckman, *Political Preference Formation: Competition, Deliberation, and the (Ir)relevance of Framing Effects*, 98 AM. POL. SCI. REV. 671 (2004); and Deborah A. Stone, *Causal Stories and the Formation of Policy Agendas*, 104 POL. SCI. Q. 281 (1989).

a national brouhaha. But, of course, national elites aren't particularly enamored of national brouhahas, which means that the most important fights will happen only at the local level.

#### 4. The Costs of the "Big Sort": Undermining State Politics

There are other democratic costs to a system checkered with red and blue enclaves. Choice is a celebrated feature in federalism discourse, and rightly so. Indeed, one of the most common arguments against spillovers invokes the values of democratic self-rule, the notion that each polity ought to set policy for itself and itself alone. We acknowledge these benefits in the next Part, but we also insist that there are costs to what Bill Bishop evocatively terms the "Big Sort."<sup>132</sup>

Just as the Big Sort excuses national officials from doing the tough work of democratic compromise, it also excuses state officials from the same work. Because no state is homogenous, state officials are always aware that not everyone is happy with the enclave they've built for their citizens, be it red or blue. But vetogates and self-interested politicians can be as problematic in state legislatures as they are in Congress. Absent resistance by localities within the state,<sup>133</sup> arguments for change are presented by people who usually lack the votes to do anything about it. State politicians have every incentive to count the votes and brush the gadflies aside. Radio silence is the prerogative of power. On too many issues, state officials lack much by way of an incentive to cross party lines or compromise with those who seek change, something that can result in the same type of stasis and lockup that exists at the federal level.

We worry not just that the enclave solution is too easy for political elites but that it's too easy for everyday citizens. It's too comfortable to sort oneself into homogenous communities and ignore those with different views. The Big Sort prevents citizens from living under someone else's law or trying out someone else's policies. Opportunities for democratic engagement are reduced. More importantly, as we discuss below, *incentives* for democratic engagement are reduced.

If you think that living under someone else's law isn't a democratic good, think harder. Enclaves encase us in a protective policymaking bubble and shield us from laws with which we disagree. As we explain below, when citizens of one state must accommodate the preferences of another's, they are enlisted in the practice of pluralism. They are reminded that they are not just part of a state but part of a union.<sup>134</sup> A vibrant democracy depends not just on choice but on accommodation, compromise, and engagement. These

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132. BILL BISHOP, *THE BIG SORT: WHY THE CLUSTERING OF LIKE-MINDED AMERICA IS TEARING US APART* (2009). Bishop was talking about a far more granular form of sorting than we do here, but we nonetheless think the general point holds.

133. See Gerken, *supra* note 105.

134. Thanks to Xiao Wang for suggesting this formulation. As Professor LaCroix has shown, the notion of union was central to early debates over federalism. Alison LaCroix, Essay, *The Shadow Powers of Article I*, 123 YALE L.J. 1626 (2014).

are not the habits that enclaves cultivate. With the easy comforts of the Big Sort comes the risk that we lose sight of the other side and, concomitantly, our ability to engage with it. Spillovers force engagement and thereby spur the processes on which our democracy depends.

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We recognize, of course, that ours is a contested vision of what ails our democracy. But so is the other side's. We aren't attempting to establish that our assessment is the correct one; we doubt that could be done in a single paper, let alone a subpart. All we wish to establish here is that there are two plausible descriptions of the current state of affairs. After all, those who worry about interstate friction don't have a knock-down argument on the facts, either. To the contrary, the evidence they offer on the dangers of interstate friction doesn't go much past gloomy reminders about the Articles of Confederation.<sup>135</sup>

Moreover, while we certainly don't have a magic measuring stick to establish that ours is the correct assessment, neither do those who emphasize the risks associated with interstate friction. It's possible that both sides are correct. It's possible that we swing like a pendulum between the two extremes. But as long as both remain realistic possibilities, we ought to be attentive to both accounts and tailor our regulatory strategy to whichever state of affairs currently prevails.

Put differently, we believe that interstate friction is much like state–federal friction. Friction at the vertical level can lead to all sorts of problems, including inefficiency, conflict, and division. Federalism scholars don't deny these problems. They simply insist that we also pay attention to the *productive* possibilities associated with state–federal friction, that we recognize that too little conflict can be as problematic as too much. The key is achieving the right balance. And it's worth noting that scholars of vertical federalism haven't come up with a magic measuring stick for striking that balance, either.<sup>136</sup> Nonetheless, vertical federalism has muddled through, and we think that horizontal federalism can do the same.

#### B. *The Solution to Inertia and Enclaves: Spillovers*

If you accept our admittedly contestable account of the problem—that we should worry as much about inertia as brouhahas, as much about the comfort of enclaves as the discomfort of conflict—then you can see why spillovers matter. Spillovers mitigate the problems associated with inertia and enclaves by generating other types of problems—controversies and conflicts and costs that are far more likely to galvanize democratic engagement

135. See, e.g., Erbsen, *supra* note 5, at 511–12, 533–34; Laycock, *supra* note 7, at 316 & n.337; Metzger, *supra* note 2, at 1479–80.

136. See, e.g., Ernest A. Young, *A Research Agenda for Uncooperative Federalists*, 48 *TULSA L. REV.* 427, 436–37 (2013).

than yet another editorial, yet another protest, yet another blog post. Spillovers put issues on the national agenda, convert inchoate majorities into cohesive ones, and overcome congressional gridlock. They also enlist state politicians and their constituents in the project of pluralism, forcing state officials to engage and state citizens to take their democratic lumps.

Put differently, the high-salience spillovers described in our matrix above bring with them a set of underappreciated benefits that must be weighed against their costs. While we have no quarrel with the impulse to look to courts to cabin low-salience, economically costly spillovers (Box 2), high-salience spillovers (be they economically costly, as with Box 1, or not, as with Box 3) require a different accounting than they've received in the literature.

### 1. Spillovers and the Problem of Inertia

Spillovers mitigate the problems associated with policymaking inertia because they provide the friction necessary to ignite the national policymaking process.<sup>137</sup>

#### a. Agenda Setting

Spillovers can get issues on the national policymaking agenda, which is no mean feat these days. The enclave strategy makes life easy for national elites because no one is demanding that they do anything. But when enclaves break down and one side forces its unwelcome policies on the other, the put-upon party almost inevitably looks for a federal referee. Auto executives who hate California's strict environmental policies plead with the Environmental Protection Agency ("EPA") to preempt them.<sup>138</sup> Opponents of marriage equality seek assurances from Congress that they need not recognize same-sex marriages performed in other states.<sup>139</sup> States ravaged by gun violence ask courts to force other states to tighten their regulations.<sup>140</sup> If you want to get something on the national agenda, in short, you might take a lesson from a first-grade classroom. One way to get the teacher's attention is to raise your hand. The other is to pull the pigtails of the girl sitting next to you.<sup>141</sup>

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137. To be sure, some of these benefits come from the mere existence of policymaking diversity. See Gerken, *supra* note 105. Spillovers magnify the power of policymaking differences; they are to jurisdictional diversity as steroids are to athletic prowess. Many thanks to Alex Hemmer for pushing us on this point.

138. See sources cited *infra* note 143.

139. See sources cited *infra* notes 165–166.

140. See source cited *supra* note 96.

141. We recognize that agenda setting is not an unqualified good. Thanks to Bruce Ackerman and Ernest Young for reminding us that too many things on the agenda can overwhelm federal decisionmakers. Given the current paralysis in Washington, however, overloading the national agenda isn't our worry right now.

Note the dynamic relationship between state and national policymaking that spillovers unleash. Spillovers don't just push issues onto the national agenda; they push issues onto state agendas as well. Sometimes, as we discuss below, that's because state officials are forced to work the issues out themselves. Other times, however, the push for state regulation comes because spillovers provide opportunities for backdoor policymaking.<sup>142</sup> The interest group that blocks legislation in Congress often can't block that legislation in every state. Climate-change advocates stymied in Congress, for example, have persuaded California to pass regulations that affect cars sold throughout the country. Spillovers are a key reason these alternative state avenues are so attractive. If a local law can have a regional or national impact, then states offer potential fora for backdoor national policymaking. It may not be a normatively attractive strategy, but it's a politically irresistible one.

b. *Overcoming Gridlock*

Backdoor policymaking eventually spurs front-porch debates, pushing issues onto the policymaking agenda. As a result, spillovers serve a second, related democratic purpose: overcoming national gridlock. This argument has been repeatedly made in the academic literature.<sup>143</sup> In environmental-law scholarship, it even has a name—"defensive preemption," used to describe how state spillovers reverse industry opposition to broadly popular legislation and thus break up congressional gridlock.<sup>144</sup>

This policymaking dynamic works in an intuitive way. Typically, those who seek change bear the full price of inertia, while those who oppose change reap all of inertia's benefits. When interest groups use states for backdoor policymaking, they upset the status quo. Spillovers thus shift the costs of inertia, something that often prompts proponents *and* opponents of a policy to demand a national solution.

Spillovers can reduce legislative inertia in another way. Absent spillovers, minorities using vetogates to block legislation bear no cost for their intransigence. They have two options—prevent a policy from being enacted (total victory) or allow that policy to be enacted (complete defeat). But spillovers change that calculus: blocking a policy from being enacted at the national level is only a partial victory because the state spillovers remain. The

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142. See Issacharoff & Sharkey, *supra* note 28.

143. For two of the most intelligent formulations outside the area of environmental law, see Daniel Halberstam, *The Foreign Affairs of Federal Systems: A National Perspective on the Benefits of State Participation*, 46 VILL. L. REV. 1015, 1017, 1057 (2001) (arguing that state involvement in foreign affairs can "overcom[e] bureaucratic inertia at the central level of governance"), and Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1, 1 (2007) (discussing preemption doctrine and the role of business interests in setting Congress's agenda).

144. See, e.g., J.R. DeShazo & Jody Freeman, *Timing and Form of Federal Regulation: The Case of Climate Change*, 155 U. PA. L. REV. 1499, 1506–16 (2007); Elliott et al., *supra* note 36, at 326–29.



gap between the status quo and the new policy becomes narrower. As a result, opponents may moderate or drop their opposition.

c. *Eliciting National Preferences*

Spillovers are also useful because they can help *elicit* majoritarian preferences. Inertia runs deep in American politics. People aren't inclined to engage with an issue unless they must. Spillovers force engagement in a way that conventional forms of advocacy (editorials, political ads, even protests) rarely do. The costs and conflicts engendered by spillovers can provide the spark needed to jumpstart the policymaking process, pulling national elites into the controversy even when they'd rather avoid it. And national elites play a crucial role in forging national positions. Without political elites pounding the table, framing the issue, and pushing a policy forward, the electorate's view on an issue will often remain inchoate.<sup>145</sup>

Spillovers don't just prompt the majority to clarify what its actual preferences are but also ensure that, when the national majority engages, the issues aren't merely theoretical. Proponents of the policy can offer not just abstract arguments but concrete policymaking examples. They can offer not just an idea but a real-life instantiation of that view.<sup>146</sup>

A good example of the role that interstate spillovers play in prodding national policymaking can be seen with the Clean Air Act.<sup>147</sup> Air pollution is a classic spillover, with upwind states imposing the costs of their lax regulations on their downwind neighbors.<sup>148</sup> During the 1960s, weak federal regulation failed to fix this problem.<sup>149</sup> Eventually, interstate conflict over the issue—the most visible conflict being a fight between Ohio and West Virginia over pollution from a Union Carbide plant—put the problem on the national agenda.<sup>150</sup> The debates that ensued changed the views of national elites and eventually resulted in the passage of the 1970 amendments to the Clean Air Act.<sup>151</sup> This story occurred twice more. When air pollution persisted in the wake of the 1970 amendments, environmental groups first

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145. While spillovers can attract the polity's attention, they may cause enough friction to polarize voters, something that may make the national fight more difficult (or at least a good deal more passionate). Thanks to Cristina Rodríguez for pushing us on this point.

146. See Gerken, *supra* note 105.

147. Many thanks to Rosa Po for suggesting this example.

148. See Valerie Lee, *Interstate Sulfate Pollution: Proposed Amendments to the Clean Air Act*, 5 HARV. ENVTL. L. REV. 71, 76 (1981); Daniel B. Trinkle, *Cars, Congress, and Clean Air for the Northeast: A Separation of Powers Analysis of the Ozone Transport Commission*, 23 B.C. ENVTL. AFF. L. REV. 169, 169 (1995); Kay M. Crider, Note, *Interstate Air Pollution: Over a Decade of Ineffective Regulation*, 64 CHI.-KENT L. REV. 619, 620–21 (1988).

149. See Geoffrey L. Wilcox, *New England and the Challenge of Interstate Ozone Pollution Under the Clean Air Act of 1990*, 24 B.C. ENVTL. AFF. L. REV. 1 (1996).

150. See Bruce M. Kramer, *Transboundary Air Pollution and the Clean Air Act: An Historical Perspective*, 32 U. KAN. L. REV. 181, 189 (1983).

151. See Bruce M. Kramer, *The 1970 Clean Air Amendments: Federalism in Action or Inaction?*, 6 TEX. TECH L. REV. 47, 58 (1974); Arthur C. Stern, *History of Air Pollution Legislation in the United States*, 32 J. AIR POLLUTION CONTROL ASS'N 44, 55–57 (1982).

looked to the courts for help.<sup>152</sup> After the courts refused to put an end to these spillovers, states and environmental groups again turned to Congress and again used spillovers to justify federal intervention, resulting in the 1977 amendments. The same pattern occurred during the 1980s, with courts again refusing to referee this fight<sup>153</sup> and a coalition of states (particularly New England states) leading the charge within the EPA and on Capitol Hill. That battle eventually resulted in another set of important changes to the Clean Air Act in 1990.

## 2. Spillovers and the Problem of Enclaves

### a. *Spillovers and State Officials*

Just as spillovers help us overcome policymaking inertia, they also mitigate the problems associated with the Big Sort. Spillovers force state politicians to suit up and get in the game, just as they do with national politicians. As noted above, state politicians have too many incentives to cater to their majorities while ignoring their dissenters.<sup>154</sup> But one state's dissenters are another state's majority, which means they can impose from the outside positions that they cannot demand from the inside. When these spillovers occur, state politicians cannot maintain their radio silence. It's hard to ignore the opposition when it is imposing its views on your unhappy constituents. Oftentimes, as noted above, state politicians will look to a national referee when they encounter this problem.<sup>155</sup> But when a national umpire is unavailable, spillovers force state politicians to do what they are supposed to do: politic.

Note here the continuities between this idea and the literature on competitive federalism.<sup>156</sup> It is a commonplace in that literature that interstate competition—states' competing for one another's citizens by passing attractive policies—pushes states to change their ways.<sup>157</sup> One might even think of these efforts to compete as a form of spillover (a low tax rate in one state attracts residents of another, reducing the size of the latter's tax base). And just as spillovers force residents of one state to live under the laws of another state, spillovers can also jumpstart state policymaking. Like the federal government, states suffer from elite indifference, legislative gridlock, and minority obstruction. Spillovers prod state policymakers into action, forcing political elites to debate policies they'd rather ignore or solve problems they'd rather not address.

152. See, e.g., *Natural Res. Def. Council, Inc. v. EPA*, 483 F.2d 690, 691 (8th Cir. 1973).

153. See, e.g., *New York v. EPA*, 852 F.2d 574, 580 (D.C. Cir. 1988); *Air Pollution Control Dist. v. EPA*, 739 F.2d 1071, 1094 (6th Cir. 1984).

154. See *supra* Section III.A.4.

155. See *supra* Section III.B.1.

156. For a sampling of this vast literature, see *COMPETITION AMONG STATES AND LOCAL GOVERNMENTS* (Daphne A. Kenyon & John Kincaid eds., 1991) and *THOMAS R. DYE, AMERICAN FEDERALISM: COMPETITION AMONG GOVERNMENTS* (1990).

157. E.g., *ZIMMERMAN*, *supra* note 42; see also *Bowman*, *supra* note 44.

Spillovers don't just push politicians to act; they push them to accommodate those with a different view. When a spillover occurs, state officials are forced to cross political boundaries, not just territorial ones. State elites must learn to reach across party lines. They must compromise, build coalitions, and find common ground. They are forced to politic not just as representatives of their state but as members of a union. After all, "Our (Horizontal) Federalism" places state officials in a complex, iterated game in which turnaround is fair play. States can inflict spillovers themselves as well as have spillovers inflicted upon them. State officials must think not just about which of their policies shouldn't extend beyond the state's borders but also about which ones should. They must worry not just about spillovers but also about spillunders. Spillovers, in short, enlist state elites in the practice of pluralism and pull them into the maintenance of a union.

Consider, for instance, how the UCC came about. Conflicting state regulations were causing a variety of problematic spillovers, with different interest groups in different places blocking individual states from passing sensible fixes. Spillover problems became serious enough that the National Conference of Commissioners on Uniform State Laws ("NCCUSL") took on the project of drafting a model code. It thereby provided an institutional site for state officials to mobilize and resolve this problem without the assistance of a federal referee. The NCCUSL was forced to think about when, precisely, state policies should reach past state lines and when they shouldn't.

The UCC succeeded in part because it gave states a useful shortcut for updating their laws.<sup>158</sup> And like all model codes, the UCC provided a "focal point" for passing legislation.<sup>159</sup> But less noticed—and perhaps more important—was that the UCC also provided a focal point for politicking and compromise. Indeed, the UCC has been substantially revised to address state opposition,<sup>160</sup> and parts of it were deliberately drafted to allow for diverging state practices or to avoid provoking the relevant interest groups.<sup>161</sup> While

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158. See generally Larry E. Ribstein & Bruce H. Kobayashi, *An Economic Analysis of Uniform State Laws*, 25 J. LEGAL STUD. 131, 140 (1996) (discussing how uniform laws reduce drafting costs).

159. See *id.* at 139 (discussing the role of model laws as a focal point for interstate competition).

160. Fred H. Miller, *The Uniform Commercial Code: Will the Experiment Continue?*, 43 MERCER L. REV. 799, 817 (1992). Similarly, the NCCUSL decided not to enact a uniform-payments law that it had "directed a drafting committee to create" because "banks disliked the law." Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. PA. L. REV. 595, 641–42 (1995).

161. See Lawrence J. Bugge, *Commercial Law, Federalism, and the Future*, 17 DEL. J. CORP. L. 11, 29 (1992); Grant Gilmore, *The Good Faith Purchase Idea and the Uniform Commercial Code: Confessions of a Repentant Draftsman*, 15 GA. L. REV. 605, 629 (1981); Homer Kripke, *The Principles Underlying the Drafting of the Universal Commercial Code*, 1962 U. ILL. LEGAL F. 321, 327; Kathleen Patchel, *Interest Group Politics, Federalism, and the Uniform Laws Process: Some Lessons from the Uniform Commercial Code*, 78 MINN. L. REV. 83, 100–01, 103 (1993). This is exactly what two prominent academics predict. See Schwartz & Scott, *supra* note 160, at 637 (noting that uniform-law groups "will produce many [vague] rules" and "have status quo bias that induces them to reject reforms that any cohesive interest group would oppose").

that fact frustrates academics,<sup>162</sup> with their penchant for intellectual purity, it is precisely this type of compromise that made it possible for every state to adopt the UCC. Indeed, second-best solutions of this sort are just what we would expect from one of the political institutions safeguarding horizontal federalism. Spillovers, in sum, teed up a political process that resulted in a mutually beneficial solution for all parties concerned. State policymaking processes were prodded forward, gridlock was overcome, and the states were able to reach compromises that addressed the source of conflict between them while modernizing their own codes.

b. *Spillovers and State Citizens*

Spillovers also enlist everyday citizens in the practice of pluralism.<sup>163</sup> At the very least, they prevent those of us ensconced in our blue and red enclaves from being oblivious. We are reminded that other viewpoints exist—that some people believe in the morality of same-sex marriage and that others think we ought to teach morality in schools. Better yet, we are exposed to other views in their most concrete form. It is too easy to dismiss challenges to our preferred status quo, especially when the alternative is purely hypothetical. But spillovers bring that hypothetical to life and, in doing so, they often reveal that fears about a new policy are unfounded. By forcing automobile manufacturers to develop new emission-control technology in the late 1970s, for example, California showed that cars could be made more fuel efficient without unduly raising sticker prices. Similarly, thanks to states like Massachusetts, we are now able to start assessing whether the dire predictions made by opponents of same-sex marriage have any basis in reality.

Spillovers don't just remind us that other viewpoints exist but force us to engage with them. Because spillovers make it harder for us to disappear into our own policymaking Edens, they push us toward the many forms of voice that politicking involves.<sup>164</sup> Indeed, spillovers ensure that those *least* likely to be receptive to a policymaking idea—those nestled in enclaves with the opposite policy—confront the policy directly. The progressives who decry social conservatism might actually have to read the Texas school board's preferred texts. They might even have to think about why other Americans think these issues are important. Opponents of same-sex marriage might

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162. See, e.g., LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 677 (2d ed. 1985) (“[T]he problems for reform [undertaken by uniform-law organizations] . . . were problems of logic and consistency. . . . [B]asically, modern and uniform codes were mealy-mouthed or at best meliorative.”).

163. Rodríguez has made a variant of this point in work that focuses largely on vertical federalism. In her view, state and local sites can “amplif[y] the polity’s capacity for politics.” Rodríguez, *supra* note 111, at 4. They do so by creating sites for working out conflict, thereby teaching us the skills required for integration as we continually revisit the problem of accommodation in local and state nodes. *Id.* at 4 & n.8.

164. This frame, of course, comes from ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* (1970). Thanks to Sundep Iyer and Allan Erbsen for suggesting this frame.

find themselves living next to a same-sex couple. Whether those encounters soften people's views or catalyze a political fight, they help spur democratic engagement.

Spillovers also force us to live under someone else's law, which is a democratic good unto itself and an essential practice for a robust union. In politics, we usually ask voters what they want rather than what they can live with. But the second question is far more important in a diverse polity like ours. Spillovers elicit the answer to this second question by forcing voters to live under someone else's regulations for a bit. They must drive a more fuel-efficient car. Or teach from a textbook more conservative than they'd prefer. Or live next to someone who owns guns that would be difficult to purchase in state. It may be that they discover that the spillover policy isn't as bad as they thought—that the consequences weren't as dire, that the slope wasn't as slippery. Or it may be that engaging with the policy cements their view that the policy is a mistake.

That leads us to another benefit associated with spillovers: they tell us not just what policies we can live with but which ones we can't. In our highly polarized system, it sometimes seems like we disagree on everything. Spillovers help us sort out annoying differences that prompt little more than a collective shrug from genuinely deep disagreements that require our collective attention. Spillovers tell us a great deal more than polling or voting about where our priorities really lie. Which means they tell us a great deal more than polling or voting about whether a *modus vivendi* can be had.

Same-sex marriage is a good example of spillovers' effects on everyday politics. When the Hawaii Supreme Court set the state on the path toward same-sex marriage,<sup>165</sup> the national reaction was swift and severe.<sup>166</sup> Even the possibility of such a ruling prompted numerous states to pass "defense of marriage" bills to ensure that Hawaii's policy didn't spill over into other states.<sup>167</sup> Moreover, just as one would expect, state officials turned to a national referee, prodding Congress to pass DOMA in 1996. The threat of the Hawaii spillover suggested that, at that time, a *modus vivendi* was unattainable.

Things change. When the Massachusetts Supreme Court required the state to issue same-sex marriage licenses, Massachusetts's leadership, obviously worried about spillovers, tried to confine the effects of the decision to its own territory by limiting same-sex marriage licenses to state residents.<sup>168</sup> (The state ultimately abandoned this policy and ended up marrying same-

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165. See *Baehr v. Lewin*, 852 P.2d 44, 67 (Hawaii 1993) (holding that sex-based marriage classification is subject to strict scrutiny under the Hawaii Constitution).

166. For an account, see MICHAEL J. KLARMAN, *FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE* 57–60 (2013).

167. See *id.* at 58.

168. Pam Belluck, *Romney Won't Let Gay Outsiders Wed in Massachusetts*, N.Y. TIMES, Apr. 25, 2004, at N1, available at [www.nytimes.com/2004/04/25/us/romney-won-t-let-gay-outsiders-wed-in-massachusetts.html](http://www.nytimes.com/2004/04/25/us/romney-won-t-let-gay-outsiders-wed-in-massachusetts.html).

sex couples from out of state.)<sup>169</sup> The city of San Francisco, which was issuing same-sex marriage licenses during the same period, deliberately courted a spillover brouhaha by issuing marriage licenses to anyone willing to make the trip to California. These policies forced political actors in other states—who had previously ducked the issue—to take a stand on whether those marriages were valid. Spillovers gave the marriage-equality movement a toe-hold even in states that weren't ready to issue same-sex marriage licenses by forcing reluctant state elites to introduce the subject to their constituents.<sup>170</sup> As more states began to marry same-sex couples and those couples began to move, same-sex marriage became a reality for everyday Americans, even those residing outside of blue enclaves. We cannot tell, of course, whether this day-to-day exposure has helped further the cause of marriage equality. But one suspects it might have. It is one thing to vote against marriage equality in the privacy of the voting booth or tell a pollster that you revile same-sex marriage. But when a gay couple buys the house next door and shows up with a casserole, that position is harder to maintain.

Spillovers, in short, create opportunities for all of us to live under someone else's law, an underappreciated feature of a well-functioning democracy and an essential practice in a well-functioning union. When we are forced to abide someone else's policies, we sometimes learn to accommodate one another's preferences, to identify everyone's second-best solution, to engage in the practice of pluralism, or at least to figure out what we really think about a question. It's not easy, and it's certainly not fun. But these democratic benefits should matter when we tote up the costs and benefits of spillovers.

*C. The Lesson of Vertical Federalism: Harnessing Friction,  
Not Eliminating It*

If we are correct that spillovers generate democratic benefits as well as costs, then we ought to think of horizontal federalism much as we do vertical federalism. We need to think about how to harness friction rather than eliminate it. We need to know when to let spillovers run their course and when the game isn't worth the candle. We need to distinguish not just between high-cost and low-cost economic spillovers but between high-salience and low-salience ones as well. And we need to decide *which* institutional actors are best suited for refereeing the battles that spillovers engender.

Scholars of vertical federalism have thought long and hard about a similar set of issues. They've also worked through many of the obvious counterarguments to the claims we are making here, those having to do with sovereignty, self-rule, and institutional competence. As a result, that literature provides a roadmap for scholars of horizontal federalism as they move forward.

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169. Katie Zezima, *Massachusetts: Same-Sex Couples from Other States May Now Marry*, N.Y. TIMES, Aug. 1, 2008, at A13, available at <http://query.nytimes.com/gst/fullpage.html?res=9B03E1D6103AF932A3575BC0A96E9C8B63>.

170. See David Von Drehle & Alan Cooperman, *Same-Sex Marriage Vaulted Into Spotlight*, WASH. POST, Mar. 8, 2004, at A1.



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Before we turn to the claims in Parts IV and V, it is worth noting that even those who think that spillovers provide no benefits should nonetheless continue reading. Our descriptive claims still hold, after all. And descriptive claims matter for federalism theory, which is as much about how federalism actually works as about how it ought to work. Moreover, even if you think that the democratic benefits associated with spillovers are smaller than we do, these benefits still matter. Any effort to eliminate spillovers has a price—that's why so many spillovers are left unregulated in the first place. Because spillovers present finely calibrated balancing questions, even modest benefits should be included in that calculus.

As for our normative premises, they are obviously contestable. First, ours is an agonistic conception of democracy,<sup>171</sup> one that envisions politics as a full-contact sport. While judges and scholars typically imagine state policy being made with only the state polity in mind, our account depicts states as sites for pursuing a national agenda.<sup>172</sup> We see state policy as a continuation of "politics by other means."<sup>173</sup> We also insist that learning to live with one another involves learning to live under one another's laws and that spillovers should matter as much as spillovers to those who care about state power.

Second, part of our story hinges on a nationalist account of federalism<sup>174</sup> that emphasizes how horizontal federalism serves national policymaking ends. Those who don't share those nationalist aims may object to the notion that crystallizing a national policy or passing national legislation is a good thing. That is precisely why some have dismissed the idea of a safeguards argument in the first place. Young and Baker, for instance, worry about "horizontal aggrandizement," which occurs when a national majority imposes its preferences on a concentrated national minority.<sup>175</sup> If you take a state-centered view of federalism, you might worry about ceding state autonomy for a more robust national democracy.

We're willing to make that trade-off—and, as our descriptive account makes clear, we think the country has *already* made it to a large extent. But it is worth noting again that we don't insist on national uniformity.<sup>176</sup> We believe simply that, if disuniformity ends up being national policy, it should be a choice, not an accident. Nonetheless, our account is unquestionably aimed at maintaining a healthy democracy, not increasing state autonomy.

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171. See generally HANNAH ARENDT, *THE HUMAN CONDITION* (1958).

172. For an elegant account of this phenomenon, see Bulman-Pozen, *supra* note 108, at 1078.

173. Apologies to Carl von Clausewitz. CARL VON CLAUSEWITZ, *ON WAR* 87 (Michael Howard & Peter Paret eds. & trans., Princeton Univ. Press 1976) (1832).

174. See Gerken, *supra* note 11, at 10; Gerken, *supra* note 21, at 1889.

175. Baker, *supra* note 2, at 966–72; Baker & Young, *supra* note 2, at 117–26; see also Pursley, *Dormancy*, *supra* note 44, at 526–27.

176. See *supra* text accompanying notes 124–126.



You might think that a horizontal-safeguards argument isn't worth much if it doesn't augment state autonomy. There are several problems with that response. First, it takes too narrow a view of state power. While spillovers may do little for state autonomy, our account valorizes different and equally important forms of state power. It emphasizes the power that states exercise in driving national policy by virtue of the fact that they are deeply embedded in an integrated national system. As one of us has argued elsewhere,<sup>177</sup> *that* form of power is understudied and undervalued.

Similarly, as we argue at the end of this Article, our account pays a great deal more attention to another important form of state power, one that is overlooked in these debates: the power to ensure that a state's policymaking choices stick, to ensure that one state's law crosses over into another. Those who care the most about state power should worry as much about spillovers as spillovers, as much about state laws' being denied an appropriate extraterritorial reach as states' shielding their residents from other states' laws.

The idea that the political safeguards should be a one-way ratchet for state autonomy not only takes too narrow a view of state power; it also takes too narrow a view of federalism. As noted above,<sup>178</sup> state power is not an end unto itself. The political safeguards of vertical federalism are designed to preserve the right kind of relationship between the states and the federal government, not to augment state power. So, too, the goal of horizontal federalism is not state autonomy but a democracy that works.<sup>179</sup>

#### IV. COUNTERARGUMENTS: OF SOVEREIGNTY AND COURTS

In Part III, we supplied what horizontal federalism currently lacks: a descriptive and normative account as to why a good deal of interstate conflict can and should be left to politics. Once we begin to think about interstate friction in the same way we think about state-federal friction—as a real-world phenomenon that has benefits as well as costs—then the natural question is how best to harness its productive possibilities while minimizing unacceptable costs. The question is twofold. How do we manage this conflict? And which institutions should manage it?

Here again, vertical federalism offers a useful roadmap. There the debate has moved from a formalist, court-centered approach to one that acknowledges the fact of regulatory overlap and embraces the role that nonjudicial institutions play in refereeing state-federal conflict.

Much of the literature on horizontal federalism, in sharp contrast, looks like the early accounts of vertical federalism—court centered and dominated by notions of sovereignty. It's not surprising that a safeguards account has

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177. See Gerken, *supra* note 11, at 33–44.

178. See *supra* text accompanying notes 21–24.

179. We take Baker and Young to be concerned about this precise issue. See Baker & Young, *supra* note 2, at 117–26. They worry that the dynamic we are describing will eventually undermine state autonomy to such an extent that states can no longer play the role they ought to play in a healthy democratic system. *Id.*

yet to take hold when the two best counterarguments against such an account—the normative claim that sovereignty should trump all else and the descriptive assumption that courts are best suited to mediate interstate conflict—permeate the literature on horizontal federalism. It took decades to debunk those arguments in the context of vertical federalism. Here we'll take an initial run at them while recognizing that a fully satisfying response requires more time and space than we have here. We hope, at least, to cast some doubt on the idea that sovereignty and courts are any more essential to horizontal federalism than they are to vertical federalism.

### A. *The Sovereignty Camp*

There has long been a debate within vertical federalism about how best to manage conflict. According to the canonical story, states and the federal government should preside as sovereigns over their own regulatory empires.<sup>180</sup> This “separate spheres” approach had many advantages. It was deeply intuitive, conceptually tidy, and theoretically elegant. The problem was that its descriptive premise was so distant from reality that it couldn't possibly succeed.

It is striking how closely the early work on vertical federalism mirrors the current work on horizontal federalism. There are sovereignty fans in the realm of horizontal federalism as well; indeed, the field seems to be dominated by them.<sup>181</sup> Moreover, in our view, they are making the same mistakes.

Like their early counterparts in the vertical realm, scholars of horizontal federalism rely on the notion of sovereignty in thinking about intergovernmental conflict, and much of their work is premised on the assumption that it's possible to cut back on regulatory overlap and confine states' reach to their own territories. In these debates, sovereignty tends to be a stand-in for a larger set of normative goods, which typically includes territoriality, equality among states, and democratic self-rule.<sup>182</sup>

Erbsen, for instance, insists that states are “sovereign” because they enjoy “substantial independence and [a] significant reservoir of authority,”<sup>183</sup>

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180. For a brief but illuminating history, see Ernest A. Young, “*The Ordinary Diet of the Law*”: *The Presumption Against Preemption in the Roberts Court*, 2011 SUP. CT. REV. 253, 257–61 (2011).

181. See sources cited *supra* notes 50–52.

182. See *supra* notes 50–52.

183. Erbsen, *supra* note 5, at 499 n.9. Erbsen's reference to sovereignty is a nuanced one. He emphasizes that he “do[es] not take a position on precisely which aspects of sovereignty states possess.” *Id.* He also criticizes the idea that the states and federal government occupy separate regulatory spheres. See *id.* at 509–10. We read this as the same kind of move made by those who favor autonomy models over sovereignty models in the context of vertical federalism. As one of us has written, while the autonomy model has softer edges and doesn't depend on absurdly formalistic distinctions, it is nonetheless rooted in the same conception of state power as the sovereignty model. Both pivot off the idea of states presiding over their own independent empires. Gerken, *supra* note 11, at 11–18.

and he worries when states exercise authority beyond their borders.<sup>184</sup> Professor Cordray argues that “each state possesses an inherent sovereign authority to govern its citizens within its territorial borders” without interference from other states.<sup>185</sup> Surveying the doctrinal silos that make up horizontal federalism, she insists that they all vindicate “the core principles of sovereignty and federalism: a state has sovereign authority within its own jurisdiction, but that authority stops at its territorial borders.”<sup>186</sup> Professor Fruehwald even draws an explicit connection between the uses of sovereignty in vertical and horizontal federalism, lamenting that “[s]tates can interfere with [each other’s] state sovereignty almost as much as the federal government can interfere with state sovereignty.”<sup>187</sup>

Just as the sovereignty types once tried to confine states and the federal government to their own regulatory spheres, scholars of horizontal federalism often want to confine states to their own territorial spheres.<sup>188</sup> (That’s why they worry so much about spillovers.) Professor Florey describes this “extraterritoriality principle” as a central justification for “invalidat[ing] state legislation purporting to regulate out-of-state conduct.”<sup>189</sup> Cordray insists that protecting state sovereignty “necessarily requires that the exercise of this power be restricted to each state’s own territorial jurisdiction.”<sup>190</sup> Laycock makes the connection between vertical and horizontal federalism explicit. Just as the Framers allocated authority between the states and the federal government based on subject matter, he writes, they allocated authority among the states based on territory, which plays a crucial role in defining states’ “semi-sovereign” status.<sup>191</sup> Greve, one of the most vigorous critics of our current system, insists that, while the prohibition against states’ regulating citizens of other states “does not appear in the text of the Constitution, its logic is so impeccable that no one has ever seriously questioned it.”<sup>192</sup>

These scholars also offer substantial normative arguments to justify the limits, emphasizing the importance of self-rule and equality among the states.<sup>193</sup> Florey insists that one of the “ideological principles of federalism”

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184. See Erbsen, *supra* note 5, at 506, 527–28.

185. Cordray, *supra* note 52, at 292–93.

186. *Id.* at 299.

187. Fruehwald, *supra* note 2, at 292; see also *supra* note 51 (collecting additional sources).

188. See Cordray, *supra* note 52; Snyder, *supra* note 51. While Erbsen worries about the friction generated when states try “to extend the effective reach of state authority beyond [its] borders,” Erbsen, *supra* note 5, at 527, he rejects the idea that state borders can “provide an easily enforceable starting and stopping point for each state’s regulatory power.” *Id.* at 509 n.49.

189. Florey, *supra* note 50, at 1081–82.

190. Cordray, *supra* note 52, at 293.

191. Laycock, *supra* note 7, at 296–97.

192. GREVE, *supra* note 5, at 71. Greve recognizes that “[t]he traditional understanding, a rule against ‘extraterritorial’ state jurisdiction,” can’t succeed but insists that certain kinds of state spillovers—those involving “*exploitation*”—must be halted. *Id.*

193. See *supra* notes 50–52 (collecting sources).

is that “states are entitled to some autonomous sphere in which to make policy free of interference from other sovereigns.”<sup>194</sup> Greve argues that the “irreducible constitutional baseline is state equality and integrity. Each state must be free to govern its own affairs, without unwanted interference by sister states. . . . [S]tate sovereignty must end at the border[ ].”<sup>195</sup>

Note also that the preference for clear rules of engagement and the orderly resolution of disputes—all hallmarks of the sovereignty approach in vertical federalism—dominate much of the work on horizontal federalism. Erbsen, for instance, argues that “[t]he basic problem [in horizontal federalism] is that the Constitution does not create a preference rule for prioritizing competing state interests analogous to the Supremacy Clause.”<sup>196</sup> A political-safeguards account, of course, would characterize that fact as a feature, not a bug. Similarly, Florey speculates that “limits on the extraterritorial reach of state legislation” might be “best understood as a means of establishing order—and confining each state to its proper sphere of authority—in a federalist system.”<sup>197</sup> Here again, a safeguards account would value the messiness and overlap that horizontal federalism generates.

We understand the attractions of the sovereignty model, particularly to the extent that it rests on notions of local democracy and self-rule. The main problem, in our view, is that the model’s factual underpinnings are too unstable to support the doctrinal edifice built upon them. As a formal matter, the states *are* sovereign. As a realistic matter, sovereignty is no more to be had in the horizontal realm than it is in the vertical realm.

Policymaking would certainly be simpler if states’ policies never crossed territorial lines and every state could regulate entirely as it sees fit. But, as we note above, spillovers are ubiquitous.<sup>198</sup> In a highly interconnected, tightly networked system like our own, states inevitably affect one another. We thus run into the same type of line-drawing problem we encounter in the vertical context, where judges and scholars have all but thrown up their hands.<sup>199</sup> Regulatory overlap is a stubborn fact in both the horizontal and vertical realm.<sup>200</sup> None of this is to deny that the notion of territory captures important intuitions about the rules of the game and the appropriate limits of

194. Florey, *supra* note 50, at 1115.

195. GREVE, *supra* note 5, at 6 (citation omitted).

196. Erbsen, *supra* note 5, at 506. Unlike many others who write about horizontal federalism, Erbsen recognizes that the solutions ultimately reached may not be conceptually clean. While he urges us to “think of horizontal federalism as encompassing the set of constitutional mechanisms for preventing or mitigating interstate friction that may arise from the out-of-state effects of in-state decisions,” Erbsen recognizes that these solutions will often be indeterminate, even “fuzzy.” *Id.* at 503, 555.

197. Florey, *supra* note 50, at 1093.

198. See *supra* Part III.

199. The Supreme Court has doggedly continued the effort in the context of the Commerce Clause, with mixed success at best, see *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012), but its preemption cases confirm the difficulty of the task. Compare *Wyeth v. Levine*, 555 U.S. 555 (2009), with *Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2008).

200. Cf. Rosen, *Exclusivity*, *supra* note 27, at 1105–08.

state power.<sup>201</sup> But the fact that something is important doesn't convert it into a descriptive reality.

There are other problems with the sovereignty approach. Much of its normative oomph comes from the idea that the states are equal to one another.<sup>202</sup> Here again, the formal truth is belied by informal realities. Just as there are "superstatutes"<sup>203</sup> and "superprecedents,"<sup>204</sup> there are what we term *superstates*. Large states like California and Texas can affect the policies of other states in a way that Rhode Island and Montana cannot. The same holds true of horizontal localism. Los Angeles is as big as many countries. In this way, the effects of a large city's local regulations often can and will swamp the regulations enacted by states with small populations and economies.

Law may be the only field in which it is acceptable to answer a normative argument with a descriptive one. But we aren't relying on descriptive reality alone in insisting that sovereignty is the wrong paradigm for thinking about horizontal federalism. There is also a strong normative case for our position. After all, if you worry that we've undervalued state territoriality or equality, we could surely try to change that state of affairs. But, as with vertical federalism, the price for maintaining clean jurisdictional lines and limited policymaking domains is too steep. We'd have to give up on a nationally integrated market. We'd have to give up on a nationally integrated political system. We might even have to stop our citizens from crossing state lines.

The most normatively appealing argument for the sovereignty approach is the one premised on democratic self-rule.<sup>205</sup> Why shouldn't people regulate themselves as they see fit? It's a deeply intuitive, deeply principled argument.<sup>206</sup> It's especially appealing in the context of interstate spillovers. When national mandates intrude on state policies, we take comfort in the fact that citizens of the affected state have participated in the decisionmaking process. That isn't true when one state polity affects another.

We take these arguments seriously. Our main concern, as we note above, is that the principle of self-rule is belied by on-the-ground realities.

As with the arguments above, you might think that we ought to change the on-the-ground realities. But would we want to sacrifice an integrated

201. Many thanks to Jed Rubenfeld for pushing us on this point. For one of the most imaginative and thoughtful accounts of the importance of territoriality, see Laycock, *supra* note 7.

202. See *supra* notes 194–195 and accompanying text.

203. WILLIAM N. ESKRIDGE, JR. & JOHN FEREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* 8 (2010).

204. Jeffrey Rosen, *So, Do You Believe in 'Superprecedent'?*, N.Y. TIMES, Oct. 30, 2005, at C1, available at [http://www.nytimes.com/2005/10/30/weekinreview/30rosen.html?\\_r=0](http://www.nytimes.com/2005/10/30/weekinreview/30rosen.html?_r=0).

205. See *supra* notes 50–52 (collecting sources).

206. The idea is so intuitive that some scholars merely refer to it in shorthand, see, e.g., Snyder, *supra* note 51, at 432 (terming interstate spillovers a "problem [that] reflects a lack of representation"), or describe it as a bedrock principle of horizontal federalism, e.g., Florey, *supra* note 50, at 1115.

national market and an integrated national democracy in order to guarantee more self-rule at the local level? While self-rule sounds like a trump card in the abstract, when we recognize the normative goods we'd have to sacrifice to attain it—the goods associated with integration—the trade-off is less appealing. We aren't suggesting that we've struck the perfect balance between separation and integration, between self-rule and accommodation. But the “democratic self-rule” argument is often cast as a principle that can be vindicated without trade-offs. It's not.

This is where our descriptive arguments connect to our normative ones. Democracy is surely about self-rule. But, as we argue above, it's also about interaction, accommodation, and compromise—precisely the values that our account of horizontal federalism highlights. The values of self-rule are pitted against the value of union. Every community would like to live according to its own preferences. Every *person* would like to live according to his own preferences. But we quickly learn that our preferences differ. Democracy requires individuals to do just what this Article argues that states should do: work it out. Sometimes we work it out directly. Sometimes we need a referee. Sometimes we just take our lumps and live under a policy we don't like. And we do so for a simple reason: we'd rather live with other people than without them. Only the misanthropes and a handful of academics resist that premise. Sometimes the costs to self-rule can outweigh the benefits of ruling together. Those are the situations when spillovers ought to be resisted. Our point here is that democratic self-rule is often played as if it were a trump card, and we don't think it's entitled to that lofty status.

B. *Are Courts the Only Institution Capable of  
Safeguarding Horizontal Federalism?*

Sovereignty fans who write about vertical federalism look to the judiciary to preserve states' ability to serve as rivals and competitors to the national government. Without judicially protected sovereignty, these scholars insist, an overweening national government can simply override or swamp conflicting state policies. Moreover, given the lawyers' penchant for clear jurisdictional lines and the orderly regulation of disputes, it is not surprising that they look to the judiciary to serve as the über-referee between the states and the federal government. Law is cleaner than politics.

Horizontal federalists share the same instincts. The vast majority of the work is devoted to developing judicial solutions to the problem of spillovers. One scholar makes this connection explicitly: “the Court should give as much attention to horizontal federalism as it has given vertical federalism.”<sup>207</sup> Another scholar devotes much of an article to classifying and identifying the many judicial means for cabining interstate friction.<sup>208</sup> Even those

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207. Fruehwald, *supra* note 2, at 292; cf. Baker, *supra* note 2, at 961 (expressing the concern that “some states will harness the federal lawmaking power to impose their policy preferences on other states to the former states' advantage”).

208. Erbsen, *supra* note 5. Erbsen's emphasis on judicial review is leavened by a nod to Congress's role in approving interstate compacts and preempting state law, but neither of

who take a more instrumental approach seem to favor the courts as referees of interstate disputes. Greve, for instance, rejects out of hand that any institutions, save the courts, can solve the problems that he identifies in today's system.<sup>209</sup>

Some of this may be path dependence, of course. We are all familiar with the role that courts play in policing spillovers, and we naturally write about those examples and think about how to extend them. But given that it is by now a truism that legal academics are too court centered, it is interesting to see just how court centered the field remains.

If you've read this far, you can probably guess why we worry about a court-centered approach. Horizontal scholars look to courts because they offer finality and certitude. Judges are adept at picking a winner, ending a fight, and shutting down a debate. As the case law makes clear, they tend to cast their decisions in the vernacular of sovereignty, with its emphasis on clear jurisdictional lines and neatly bounded regulatory enclaves.

If you value the role that spillovers play in teeing up conflict and shaking us out of our enclave-induced stupors, however, courts become a less appealing forum for resolving interstate disputes (unless you view courts as nothing more than another site of contestation). While courts surely play a role in teeing up debates and working out conflict, the advantage of the *political* safeguards of horizontal federalism is that they offer political solutions to interstate conflict. Political solutions are the products of compromise rather than case law. They may be less principled, but they are likely to be more practical. They will often be reached in a process that is messy, iterative, and nonlinear.

Finally, the political safeguards don't just produce political solutions; they rely on political *processes*. Spillovers provide opportunities for elites and everyday citizens to acquire the habits of union, to engage in the habits of pluralism. On this account, the process of resolving conflict matters as much as the solution, and we should value the political institutions that safeguard federalism even when they produce precisely the same solution courts would offer.

#### V. HOW DO THE POLITICAL SAFEGUARDS WORK IN PRACTICE?

As noted above, the main goal of this Article is to provide the descriptive and normative foundation for a political-safeguards argument by showing that a good deal of interstate conflict can and should be left to the free play of politics.

It is, of course, one thing to argue that political safeguards are a good idea in theory. It's quite another to show that they will work in practice. And it's still another to identify the precise institutional mechanisms that

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these ideas serves as the main focus of the work. *Id.* at 536, 550–55. Erbsen's later work suggests that he remains open to the possibility of a congressional role in regulating personal jurisdiction. Erbsen, *supra* note 7, at 75–88.

209. GREVE, *supra* note 5, at 306–07.



make the political safeguards work in practice. In this Part, we'll offer an initial and necessarily limited take on these last two claims. Given that academics spent decades building this same argument for vertical federalism, we offer merely a rough-and-ready list of the institutions that safeguard horizontal federalism and an initial survey of the materials available for studying these safeguards going forward.

A. *Are the Political Safeguards Working?*

The first thing to notice about "Our (Horizontal) Federalism" is that it seems to be working about as well as any of our other constitutional structures.<sup>210</sup> Kramer argues that vertical federalism was "an unplanned-for system that mediated disputes respecting the authority of state and federal governments through institutions and institutional arrangements that had not been imagined when the Constitution was ratified."<sup>211</sup>

Much the same can be said of horizontal federalism. Despite all the academic hand-wringing, horizontal federalism appears to be an accidental but reasonably well-functioning system. Spillovers routinely occur, and yet the national economy is thriving. Spillovers have not led to a civil war or anything close to it. But they *have* played an important role in teeing up national debates and unlocking the national policymaking process. State spillovers have led to national fights over environmental reform, gun regulation, and now same-sex marriage. Some fights have resulted in progressive wins (environmental reform, for instance), while others have represented conservative victories (DOMA and gun regulation being the best examples).

Spillovers have also unsettled those of us ensconced in our comfortable red and blue enclaves. Blue states are figuring out where to buy their textbooks now that Texas has effectively rewritten most of them. Michigan politicians continue to harrumph about California's environmental policies in front of the EPA. Married same-sex couples now enjoy federal benefits and are seeking these benefits from states that do not support marriage equality. Out-of-state residents are funding unionization fights in Wisconsin or abortion referenda in South Dakota.

Returning to our spillover matrix,<sup>212</sup> we have arguably managed to do a fair job of shutting down the wrong kinds of spillovers and letting the more productive ones run their course. The most damaging forms of spillovers—low-salience, economically costly regulations that threaten the national marketplace—are heavily policed.<sup>213</sup> Meanwhile, courts seem more reluctant to police high-salience, high-cost spillovers—those spillovers from Box 1 where

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210. We can almost hear Sandy Levinson cackling at that statement. He, of course, would insist that we're setting far too low a bar. See generally SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) (2006) (arguing for a constitutional convention to amend the Constitution).

211. Kramer, *supra* note 22, at 276.

212. See *supra* Section III.A.

213. See *infra* text accompanying note 119.

our account suggests that judicial intervention is not an easy question—in areas like firearms and environmental regulation.<sup>214</sup>

Meanwhile, most other spillovers have been left to the free play of politics, where they can be resolved—or not—by other institutions. Indeed, as we argue in this Section, the spillovers that ought to be shut down quickly—the high-cost, low-salience ones—are the main targets for judicial intervention, whereas judges have mostly stayed away from the high-salience spillovers that we think generate substantial democratic benefits.

“Our (Horizontal) Federalism” thus bears some resemblance to the time-honored system that parents use to deal with restless children: the pillow fight. Things that are breakable (like a national market) are off limits, the weapons are blunted (by a baseline of individual-rights protections),<sup>215</sup> and the relevant actors are left to go at it. It looks, then, as if horizontal federalism does roughly what many think vertical federalism ought to do—maintain a healthy tension between governing institutions by allowing productive sources of conflict to move forward while shutting down those sources of conflict that threaten the system as a whole.

B. *What Are the Institutional Mechanisms for  
Safeguarding Horizontal Federalism?*

At this point, no one has thought to ask which institutions safeguard horizontal federalism because no one has considered it a question worth answering. Here we offer a preliminary answer, one that focuses on the role of Congress, the political parties, administrative agencies, interest groups, interstate networks, and NGOs in mediating interstate conflict. We even discuss the role that courts can play in maintaining the conditions necessary for horizontal federalism to flourish.

We also survey the work on the subject. While none of the research is cast in this fashion—this is our own spin, not the authors’—it nevertheless supplies many of the building blocks for a political-safeguards argument going forward. Put differently, if the sovereigntists have their heirs in the burgeoning literature on horizontal federalism, we’re beginning to catch glimpses of horizontal federalism’s Wechslers and Kramers.

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214. *Infra* text accompanying notes 245–246.

215. Erbsen has suggested other strategies for blunting state weapons, including disabling states from printing money or requiring them to share control over their militias with the federal government. Erbsen, *supra* note 5, at 531–33. Professor Levitt thinks that federal removal jurisdiction plays a similar role, as it allows the federal government to prevent certain important questions from becoming the subject of interstate conflicts. Email from Justin Levitt, Visiting Assoc. Professor of Law, Yale Law Sch., to Heather Gerken, J. Skelly Wright Professor of Law, Yale Law Sch. (Apr. 14, 2013, 09:30 PM EST) (on file with author).

## 1. Congress

Congress is the most obvious institution safeguarding horizontal federalism,<sup>216</sup> just as it was Wechsler's prime candidate for safeguarding vertical federalism. As the discussion above illustrates, Congress's lawmaking power makes it a natural choice for those aggrieved by an interstate spillover and seeking a referee. Members of Congress are also tied to state officials through a network of partisan and policymaking institutions, which makes it easy for them to work the transmission lines that funnel interstate disputes from the local to the national. As an institutional matter, Congress can also engage in forms of compromise, bargaining, procrastinating, and logrolling that are simply unavailable to courts. In short, Congress can politic when faced with a spillover fight, and politicking is often what is necessary when interstate conflict arises.

In recent years, a handful of academics have started to analyze Congress's role in refereeing interstate relations. Like Wechsler, they are early movers, pushing away from the formalist, court-centered approach to resolving institutional conflict. Like Wechsler, they emphasize the role that Congress can play in mediating interstate disputes. Unlike Wechsler, however, they have not set out to develop a political-safeguards account.

Metzger and Rosen have done the most prominent work. Unlike Wechsler, Metzger assumes a substantial role for the judiciary in policing interstate conflict.<sup>217</sup> She also rejects the idea that state institutions have a role to play<sup>218</sup> and seems to accept the basic tropes of the current work on horizontal federalism—sovereignty, territoriality, and democratic self-rule.<sup>219</sup> She

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216. At least when it's playing any role at all in national politics. At the moment, Congress is not legislating—no matter how big the political push—due to high levels of political polarization. While interstate spillovers have not solved that problem, nor has anything else. At the very least, spillovers provide one source of pressure to force open what is now a blocked policymaking channel. For his part, Greve rejects the view that Congress could ever remedy what ails horizontal federalism. He describes the “near total incapacity of *Congress* to order horizontal state relations” to address what he considers to be the core problem with today's federalism: the replacement of a competitive federal regime with a cartelized one. GREVE, *supra* note 5, at 288, 306–07.

217. Like those in the sovereignty camp, Metzger remains unwilling to leave interstate disputes to the free play of politics and instead insists on “the need for a federal umpire” to police interstate relations. Metzger, *supra* note 2, at 1476. In Metzger's words, “the ultimate question is not . . . whether both Congress and the Court should be authorized to play this umpiring role . . . . Instead, the real question is *which* of these two branches of federal government should exercise primary control over interstate relations.” *Id.* at 1479 (emphasis added). Metzger seems to contemplate a good deal more policing than Wechsler because she is deeply concerned about spillovers and interstate friction. In her view, “the record of interstate discrimination under the Articles of Confederation made clear” that we cannot “have the states themselves, through either their political branches or their courts, determine when they have transgressed the Constitution's interstate demands.” *Id.* at 1478–79.

218. *Id.*

219. *Id.* at 1513–20. Rosen takes aim at some of those impulses writ large, but horizontal federalism is just one passing example in a larger conceptual argument about what he considers a set of unfortunate intellectual habits within the law.

insists, at least, that Congress is the final arbiter of interstate conflict, and she favors what she describes as a system of “judicially enforceable constitutional default rules prohibiting state discrimination that are subject to an ultimate congressional override.”<sup>220</sup>

Rosen has traveled farther along the path to a safeguards argument than Metzger, although he, too, has done so in pursuit of a different project. Whereas Metzger focuses on constitutional structure, Rosen emphasizes the functional justifications for looking to Congress rather than the courts to resolve certain forms of interstate conflict (particularly those arising under the Full Faith and Credit Clause). What is most distinctive about Rosen’s account is that he argues (correctly, in our view) that relations among the states are marked as much by regulatory overlap as by territorial division.<sup>221</sup> This insight leads Rosen to suggest generically that the “authority for resolving the scope of state extraterritorial powers . . . is left primarily to political processes.”<sup>222</sup> And it has led him to develop that claim with regard to Congress and disputes arising under the Full Faith and Credit Clause (which explicitly vests Congress with decisionmaking authority). In Rosen’s view, legislatures—especially Congress—are better suited than the courts to resolve this type of interstate fight<sup>223</sup> because they can bargain, compromise, and engage in interest balancing.

The work on vertical federalism should also improve our understanding of the role that Congress plays in the horizontal realm. While we’ve written as if there were clean divisions between horizontal and vertical federalism, one of this Article’s key contributions is to show the close ties between interstate conflict and state–federal interactions.<sup>224</sup> Much of the work on state–federal relations is therefore relevant to horizontal federalism. For instance, run-of-the-mill preemption questions implicate horizontal and vertical concerns at the same time.<sup>225</sup> Indeed, when we focus on the dormant Commerce Clause as the paradigmatic example of courts’ policing horizontal spillovers, we neglect the real lesson of cases like *CTS Corp.* and *Ouellette*. Congress, not the courts, wages many of the battles against economic protectionism.

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220. *Id.* at 1511 (footnote omitted).

221. That is, indeed, how he came to the project. Mark D. Rosen, *Congress’s Primary Role in Determining What Full Faith and Credit Requires: An Additional Argument*, 41 CAL. W. INT’L L.J. 7, 22 (2010).

222. Rosen, *State Powers*, *supra* note 27, at 1154. Indeed, he specifically invokes Wechsler in making this claim. *Id.* at 1154 n.85.

223. Rosen, *supra* note 221, at 22.

224. See, e.g., Judith Resnik, *Federalism(s)’s Forms and Norms: Contesting Rights, De-Essentializing Jurisdictional Divides, and Temporizing Accommodations*, in NOMOS LV: FEDERALISM AND SUBSIDIARITY (James Fleming ed., forthcoming 2014), available at [http://papers.ssrn.com/sol3/Delivery.cfm/SSRN\\_ID2394106\\_code68368.pdf?abstractid=2284200&mired=1](http://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID2394106_code68368.pdf?abstractid=2284200&mired=1). Thanks to Abbe Gluck and Allan Erbsen for suggesting this point.

225. Greve, who might well disagree with almost everything in this Article, makes a similar point, looking to federal preemption law as horizontal federalism’s “last line of defense.” Greve, *supra* note 38, at 111; see also GREVE, *supra* note 5, at 307 (“The entire structure of horizontal federalism has been driven into preemption law . . .”).

Of course, that is just what one would expect in a world where the political safeguards of horizontal federalism are working properly.

2. Networks, NGOs, Political Parties, Interest Groups,  
and Private Institutions

Congress, of course, is not the only institution that mediates interstate conflict. As Kramer points out, one of the reasons Wechsler's account of the political safeguards was so unsatisfying is that Wechsler confined his analysis to formally designated constitutional structures and thus missed the crucial role that other formal and informal institutions play in safeguarding state power.<sup>226</sup> By contrast, Kramer himself argues that a plethora of informal and formal institutions—including political parties, “interlocking” state and federal agencies, think tanks, lobbies, and the like—help mediate state–federal relations.<sup>227</sup> Whereas Wechsler premises most of his argument on constitutional structure and exasperatingly broad generalizations about what “the state” could do, Kramer offers a thick account of real-world institutions and a granular analysis of how state and federal officials interact.

If we follow Kramer's lead, we need to move past formally designated institutions like Congress and at least begin to identify the formal and informal institutions that mediate interstate relations. Often these institutions are the same institutions that form the connective sinews between the states and the federal government.

The political parties, for instance, play a role in knitting together state and local officials just as they connect state and federal officials. These connections were once fairly weak. But the centralization of the party structure, when paired with the increasingly common practice of cross-state campaign funding, has changed this dynamic.<sup>228</sup>

So, too, interest groups have created substantial networks among state officials as they push policy at the local level in order to lay the groundwork for national fights.<sup>229</sup> That effort, in turn, generates robust networks among state and local officials. In short, states are connected to one another for a simple reason: they are politicking and policymaking together.

States also interact with one another outside of party and interest-group politics. Social scientists like Zimmerman have analyzed a variety of strategies that states use to solve shared problems, including interstate compacts,

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226. Kramer, *supra* note 22, at 219.

227. *Id.* at 219, 222–25.

228. For the best account, see Bulman-Pozen, *supra* note 108, at 1135–46.

229. *See id.* at 1085–86. For a survey of this literature, see Heather K. Gerken & Charles Tyler, *The Myth of the Laboratories of Democracy* (June 1, 2014) (unpublished manuscript) (on file with author).

uniform laws, administrative agreements, and networking through organizations like the National Governors Association.<sup>230</sup> On the law side, Resnik has done yeoman's work on this front with her research on "translocal internationalism."<sup>231</sup> Like Metzger and Rosen, Resnik wasn't attempting to develop a safeguards account.<sup>232</sup> Nonetheless, her research on the role of social networks, public-private institutions, and translocal organizations in diffusing ideas suggests how they might help to mediate interstate disputes.

We can find more granular examples of horizontal safeguards as well. Extant work on interstate and interlocal compacts<sup>233</sup> should help us understand which institutions safeguard horizontal federalism and how they do so. There is also an interesting story about the role of private institutions like the American Law Institute, the NCCUSL, and the American Legislative Exchange Council in mediating interstate conflicts. Consider, for example, the NCCUSL's work on the UCC<sup>234</sup> or the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"),<sup>235</sup> which was designed to prevent a parent unhappy with a custody ruling in one state from taking his or her child to another state court. The UCC was intended to deal with the problem of economic spillovers, while the UCCJEA was designed to deal with the problem of custodial spillunders. In each instance, the NCCUSL worked with state stakeholders to push for a uniform law that mitigated interstate conflict.

Our own review suggests that there are at least two preliminary lessons to be drawn from this literature. First, the social science confirms what politics has shown. In many areas, there are robust, cooperative networks among federal, state, and local officials that can and do safeguard horizontal federalism. The horizontal parts of these networks provide the fora needed

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230. See ZIMMERMAN, *supra* note 42, at 33–61 (interstate compacts), 183–89 (uniform laws), 54–57 (administrative agreements), 194–95 (networking); Bowman, *supra* note 44 (discussing interstate compacts, multistate legal actions, and uniform state laws as mechanisms of interstate cooperation).

231. See Resnik sources cited *supra* note 7; Abbe R. Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 YALE L.J. 534, 571 (2011) (describing the "cross-cutting web of vertical, horizontal, and intra-state executive and legislative relationships").

232. Instead, relying on Wechsler, her aim was to convince the courts to trim back federal preemption and leave more room for state and local experimentation in areas that have traditionally been thought to involve national issues. Resnik sources cited *supra* note 7.

233. See, e.g., ZIMMERMAN, *supra* note 42; Hall, *supra* note 6. Professor Gillette has done important work on these questions at the local level. See Clayton P. Gillette, *The Conditions of Interlocal Cooperation*, 21 J.L. & POL. 365 (2005); Clayton P. Gillette, *Regionalization and Interlocal Bargains*, 76 N.Y.U. L. REV. 190 (2001).

234. For a history and analysis, see *supra* notes 158–162 and accompanying text.

235. For a history and analysis, see Brigitte M. Bodenheimer, *The Uniform Child Custody Jurisdiction Act: A Legislative Remedy for Children Caught in the Conflict of Laws*, 22 VAND. L. REV. 1207 (1969); Anne B. Goldstein, *The Tragedy of the Interstate Child: A Critical Reexamination of the Uniform Child Custody Jurisdiction Act and the Parental Kidnapping Prevention Act*, 25 U.C. DAVIS L. REV. 845 (1992); and Linda M. DeMelis, Note, *Interstate Child Custody and the Parental Kidnapping Prevention Act: The Continuing Search for a National Standard*, 45 HASTINGS L.J. 1329 (1994).



for states to work out the conflict for themselves. And the vertical dimensions of these networks allow state and local officials in conflict to pull in a national referee when they need one without regularly resorting to the courts.

Second, the extant work seems to suggest that most interstate interactions involve cooperation, not conflict. Most of the social science focuses on shared projects and shared problems. To be sure, this may be a spotlight issue. Scholars may have focused on those instances where state and local officials have managed to get something done, and they may have neglected those instances where an interstate conflict was not resolved. Or it may be that spillovers are not nearly as troublesome as the current literature would have us believe—that in fact most spillovers are handled through accommodation and compromise (or simply through learning to live with one another’s excesses). That is, of course, exactly what a safeguards argument would suggest. Needless to say, there is a great deal more work to do before we can reach a firm conclusion.

### 3. Administrative Agencies

We are less sure what to say about administrative agencies. These sites of cooperative federalism served as one of Kramer’s primary examples of the networks binding state and federal officials, and a number of scholars have also examined the role that administrative agencies play in shaping the relationship between the federal government and the states.<sup>236</sup>

It is less clear what role administrative agencies play in safeguarding horizontal federalism. To be sure, federal agencies serve an important role on the preemption front,<sup>237</sup> an issue that matters for interstate relations just as it matters for state–federal relations.<sup>238</sup> There is also evidence that states administering the same federal law form networks that allow them to assist one another and present a more united front against federal agencies.<sup>239</sup> At least in theory, one could imagine federal agencies helping states iron out their differences.<sup>240</sup> And state agencies often form networks to deal with

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236. See, e.g., Stuart Minor Benjamin & Ernest A. Young, *Tennis with the Net Down: Administrative Federalism Without Congress*, 57 DUKE L.J. 2111 (2008); Brian Galle & Mark Seidenfeld, *Administrative Law’s Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power*, 57 DUKE L.J. 1933 (2008); Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 DUKE L.J. 2023 (2008); Catherine M. Sharkey, *Federalism Accountability: “Agency-Forcing” Measures*, 58 DUKE L.J. 2125 (2009); Catherine M. Sharkey, *Inside Agency Preemption*, 110 MICH. L. REV. 521 (2012).

237. See sources cited *supra* note 236.

238. See *supra* notes 77–87, 225 and accompanying text.

239. See, e.g., Hari M. Osofsky & Hannah J. Wiseman, *Dynamic Energy Federalism*, 72 MD. L. REV. 773, 828–29 (2013). For a fascinating account of how state interest groups influence federal agencies, see Miriam Seifter, *States as Interest Groups in the Administrative Process*, 100 VA. L. REV. (forthcoming Sept. 2014).

240. We know, for instance, that they mediate between state interests and private interests in the environmental sphere. E.g., Jody Freeman, *The Obama Administration’s National Auto Policy: Lessons from the “Car Deal”*, 35 HARV. ENVTL. L. REV. 343, 358–65 (2011) (describing



shared problems themselves, sometimes in an effort to stave off federal intervention.<sup>241</sup> While we aren't aware of any sustained work on this question, we do see tantalizing glimpses of how this dynamic works in practice. Nonetheless, at this point, all we can do is note that this issue represents a prime candidate for future scholarship.

#### 4. The Courts

You might think that there is no room for courts in a political-safeguards account. It's certainly true that some scholars of vertical federalism, like Kramer and Choper, insist that the judiciary should stay out of the game entirely.<sup>242</sup> But others subscribe to the softer variant of process federalism that Young puts forward. Young acknowledges that the state–federal conflict does not always require a judicial referee, but he insists that the courts can still play an Elyian, representation-reinforcing role by creating the conditions under which productive state–federal interactions can take place.<sup>243</sup>

We can see this soft form of process federalism playing out at the horizontal level as well. Even though many scholars urge the courts to get more involved in policing spillovers, at present courts are picking their battles.

More importantly, in choosing their battles, the courts have done just what our matrix in Section III.A suggests that they ought to be doing: shutting down costly economic spillovers while allowing politically salient spillovers to run their course. Judges plainly think that they have a role to play in shutting down costly economic spillovers and have therefore fashioned several tools for that purpose (e.g., the dormant Commerce Clause, preemption doctrine, and due process). While it is a familiar point that an administrative agency might do a better job policing interstate discrimination than courts,<sup>244</sup> the latter have at least provided a consistent forum for putting a stop to those economic spillovers for which the game is not worth the candle.

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the EPA's successful efforts to mediate a conflict between California regulators and automobile manufacturers); Hari M. Osofsky, *Diagonal Federalism and Climate Change Implications for the Obama Administration*, 62 ALA. L. REV. 237, 242, 249–51 (2011) (same).

241. E.g., Hall, *supra* note 6, at 448–56.

242. CHOPER, *supra* note 14, at 2–3; Kramer, *supra* note 22, at 287–93.

243. Ernest A. Young, *Two Cheers for Process Federalism*, 46 VILL. L. REV. 1349, 1395 (2001) (“We need a *Democracy and Distrust* for federalism doctrine—that is, a doctrine of judicial review constructed to protect the *self-enforcing* nature of the federalist system.”).

244. E.g., Daniel A. Farber, *State Regulation and the Dormant Commerce Clause*, 18 URB. LAW. 567, 580–84 (1986). Amar has recently made the arresting argument that the courts' policing of the dormant Commerce Clause traces its roots back to *McCulloch*, AKHIL REED AMAR, *AMERICA'S UNWRITTEN CONSTITUTION* 524–25 n.37 (2012), thereby recasting the courts' role not as a power grab but as a necessary and natural part of our constitutional structure.

Outside of low-cost economic spillovers, however, courts have mostly left the states to work things out. Gun control<sup>245</sup> and environmental regulation<sup>246</sup> provide but two recent examples. We don't mean to suggest that courts are deliberately allowing the political safeguards of horizontal federalism to flourish. But they aren't supplying aggrieved parties with the doctrinal hooks they need to stop many of the spillovers that occur. Some commentators even think that the courts have exacerbated the spillover problem, an argument that Greve has passionately made with regard to products-liability law and personal-jurisdiction rules.<sup>247</sup>

The courts are picking their battles even within the domains in which they have chosen to act. In areas like the dormant Commerce Clause, for instance, courts have developed a working vocabulary for determining which spillovers should be shut down and which should be allowed to run their course. Notions of "discriminatory" and "nondiscriminatory" state regulations offer at least a basic grammar for determining which spillovers require court intervention and which can be left to horizontal federalism's political safeguards.

Personal jurisdiction represents another area in which the courts choose their battles. Prior to 1945, the Supreme Court clung to the idea that, to quote *Pennoyer v. Neff*, "no State can exercise direct jurisdiction and authority over persons or property without its territory."<sup>248</sup> This sovereignty-based approach forced courts to devise one formalist workaround after another to deal with the realities of interstate travel and interstate commerce.<sup>249</sup> Eventually, however, the courts' sovereignty framework shattered under the pressures created by an integrated national economy.<sup>250</sup>

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245. For an analysis of one such decision, see Alan Feuer, *U.S. Appeals Court Rejects City's Suit to Curb Guns*, N.Y. TIMES, May 1, 2008, at B2, available at <http://www.nytimes.com/2008/05/01/nyregion/01guns.html>.

246. See, e.g., *New York v. EPA*, 852 F.2d 574 (D.C. Cir. 1988); *Air Pollution Control Dist. v. EPA*, 739 F.2d 1071 (6th Cir. 1984); *Cent. Valley Chrysler-Jeep, Inc. v. Goldstene*, 529 F. Supp. 2d 1151 (E.D. Cal. 2007), *aff'd on reh'g*, 563 F. Supp. 2d 1158 (E.D. Cal. 2008); *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295 (D. Vt. 2007).

247. See GREVE, *supra* note 5.

248. 95 U.S. 714, 722 (1877).

249. The history is familiar to all. For early accounts, see Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1146–47 (1966) (explaining how the "growing mobility and complexity of modern life" lie behind jurisdictional developments in the field), and Bernard Auerbach, *The "Long Arm" Comes to Maryland*, 26 MD. L. REV. 13, 14 (1966). For specific examples of these efforts, see 4 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* §§ 1065, 1066 (3d ed. 2013).

250. For a seminal critique of *Pennoyer's* underpinnings, see Geoffrey C. Hazard, Jr., *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241, 262–72. For the funniest summary of the canonical story and an effort to complicate and undermine it, see Terry S. Kogan, *A Neo-Federalist Tale of Personal Jurisdiction*, 63 S. CAL. L. REV. 257, 258 (1990) ("Many years ago (in 1877, to be exact) there came into the realm of American jurisprudence an evil dragon known as *Pennoyer v. Neff*. . . .").

The Supreme Court famously admitted defeat in *International Shoe*,<sup>251</sup> where it invoked due process as the touchstone for jurisdiction fights and offered an approach better suited to mitigating the problem of legal spillunders. In developing this doctrine, the courts adopted a far more realistic approach to the problems that arise between the states. Judges no longer defined state power solely as the ability to shield residents from the influence of other states (the spillover problem). Instead, they acknowledged that state power sometimes includes the ability of a state to extend its reach outside its territory (the spillunder problem).<sup>252</sup> Finally, note that the solution on which the courts ultimately settled was reached in conjunction with state legislatures, which gravitated to different jurisdictional solutions (in the form of long-arm statutes) through an iterative process.<sup>253</sup> In doing so, state elites were forced to think about the appropriate reach of state power, both for their own states and for other states. The game was an iterative one, and every state could turn the tables on other states. Despite its many flaws, this hybrid judicial-legislative solution has proved to be remarkably stable.

We presume that a cautious, “pick-your-battles” strategy is roughly the sort of approach we would want the courts to adopt under a political-safeguards model. On this view, it is perfectly natural—and democratically useful—for states to seek a referee when they butt heads with one another. But it is important that there be more political referees than judicial referees. If judges step in and stop the game too quickly, we lose out on many of the democratic benefits that spillovers can generate. Resolving interstate conflict in political fora is unlikely to be as conceptually neat or as definitively tidy as the resolution a court offers. But at the same time, these solutions might be more democratically satisfying, leaving room for compromise, iterative interactions, and muddling through.

There is, of course, a great deal more to say on this front. We might imagine courts playing an Elyian role in the context of spillovers.<sup>254</sup> Courts might intervene, for instance, when the political process is unlikely to generate a solution. The dormant Commerce Clause is a good example. States have every incentive to impose financial externalities on other states, thereby

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251. *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945).

252. For a discussion of the connections between personal jurisdiction and spillunders, see *supra* text accompanying note 88.

253. To be sure, the courts play a dominant role now that so many states extend their long-arm jurisdiction as far as due process will allow. But states, particularly Illinois, led the way. John M. O’Connor, Jr. & James M. Goff, *Expanded Concepts of State Jurisdiction over Non-Residents: The Illinois Revised Practice Act*, 31 NOTRE DAME LAW. 223 (1956); see also Douglas D. McFarland, *Dictum Run Wild: How Long-Arm Statutes Extended to the Limits of Due Process*, 84 B.U. L. REV. 491, 495 n.12 (2004). Moreover, states like Illinois developed their long-arm statutes with a close eye on judicial decisions. Robert C. Casad, *Long Arm and Convenient Forum*, 20 U. KAN. L. REV. 1, 15 (1971); O’Connor & Goff, *supra*, at 232. For a history and a catalogue of long-arm statutes, see McFarland, *supra*, at 492–99.

254. See JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980). Thanks to Noah Zatz for suggesting this idea.

undermining the chances of state-generated solutions. But most of these activities are too small bore to garner the attention of Congress, thus leaving courts to do the heavy lifting. So, too, we might conclude that courts are well suited for policing interstate conflict when there is a well-developed, fully ventilated national consensus and all we need is day-to-day policing of the national rule. We might even think it's appropriate for the judiciary to intervene when the political process has played itself out and failed to reach resolution. Consider, for instance, the problem of "migratory divorces," when married people establish domicile in another state in order to take advantage of its lenient divorce laws. Interstate conflict put the issue on the political agenda. But the states (working with the NCCUSL) failed to adopt a solution on their own, and after many years the courts were eventually forced to step in.<sup>255</sup>

We're not yet ready to venture a guess as to whether the courts have struck the "right" balance—that is, whether they police too many spillovers or too few. Our goal is to provide a framework for answering that question, but there's too much work left to be done to provide a definitive answer. That's precisely why we are so skeptical about the one-way ratchet approach deployed by those who write in this field. They write as if the case for more judicial intervention is obvious, and we hope that this Article at least undermines that assumption. It may, indeed, be a long while before anyone can confidently answer this question. It's been a hotly contested issue for decades in vertical federalism, and the debate in horizontal federalism has not yet begun. You might think, for instance, that the courts have been too quick to eliminate economic spillovers under the dormant Commerce Clause, or that the courts ought not interfere with punitive-damages awards based on out-of-state conduct. The work on these issues has been confined largely to their doctrinal silos, and our point is that it ought to be reframed as part of a larger debate about horizontal federalism's safeguards.

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Another question that remains underdeveloped is how the courts should relate to the *political* institutions safeguarding horizontal federalism. But even here, remarkably enough, we can discern the beginnings of a debate—at least as it concerns Congress—in the extant work on the Full Faith and Credit Clause.<sup>256</sup> The case law and scholarship on this subject differ substantially from the work done in most of horizontal federalism's other doctrinal silos, and with good reason. The text is unusual in two respects, both highly relevant to the subject of this Article.<sup>257</sup> First, the clause can be read as a

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255. For an astute analysis, see Ann Laquer Estin, *Family Law Federalism: Divorce and the Constitution*, 16 WM. & MARY BILL RTS. J. 381 (2007).

256. We are indebted to Danny Randolph for helping us explore these possibilities.

257. U.S. CONST. art. IV, § 1 ("Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.").

textual sanction of spillovers because it requires states to enforce the judgments of other states. Second, the clause invests Congress with decisionmaking authority in this area. While the meaning of both provisions is hotly contested, at the very least the text runs against the grain by normalizing spillovers and highlighting the role that political institutions can play in resolving the conflict they engender.

It is thus unsurprising that the doctrine and scholarship that emerge from the Full Faith and Credit Clause provide a rich set of resources for thinking about the recurring puzzles in horizontal federalism. There are, to be sure, scholars who subscribe to the same principles that dominate the discourse on horizontal federalism: sovereignty, territoriality, and equality among the states.<sup>258</sup> But because the clause, in effect, mandates spillovers and provides for a congressional role in regulating them, scholars have thought more creatively about the possibilities associated with both. Some have depicted the clause as a driver of national unity that binds individual states into a robust union.<sup>259</sup> Others, like Rosen, have identified deep tensions within the clause that, on Rosen's view, "fus[es] the states into a single nation while keeping the states meaningfully empowered."<sup>260</sup> And still others,

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258. E.g., Schmitt, *supra* note 52, at 489 (looking to "territorial-based jurisdictional principles" to cabin Congress's power to give state laws extraterritorial effect and relying on the courts to protect state sovereignty); see also Paige E. Chabora, *Congress' Power Under the Full Faith and Credit Clause and the Defense of Marriage Act of 1996*, 76 NEB. L. REV. 604, 647–48 (1997) (emphasizing equality and sovereignty); Laycock, *supra* note 7, at 250–51 (recognizing territoriality and state equality as principles for defining the limits of the Full Faith and Credit Clause).

259. See, e.g., Chabora, *supra* note 258, at 647 (noting the "unifying purpose of the Clause"); Robert H. Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1, 27 (1945) (noting that behind the "application of the clause is the federal policy of a 'more perfect union' of our legal systems"); Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965, 2006 (1997) ("commitment to Union is itself a fundamental . . . value" undergirding the clause); Rex Glensy, Note, *The Extent of Congress' Power Under the Full Faith and Credit Clause*, 71 S. CAL. L. REV. 137, 152 (1997) ("Indeed, in the grand scheme, the Full Faith and Credit Clause was 'one of the principal assurances that the United States would have the unity of one nation instead of being thirteen (or fifty) separate little nations.' " (citation omitted)). For the case law, see, for example, *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 439 (1943) (depicting the clause as a "nationally unifying force"); *Williams v. North Carolina (Williams I)*, 317 U.S. 287, 303 (1942) (noting that the clause is designed to convert states "into an integrated whole"); and *Milwaukee Cnty. v. M.E. White Co.*, 296 U.S. 268, 277 (1935) (noting that the clause is designed to ensure that states are "integral parts of a single nation").

260. Rosen, *supra* note 221, at 12; see also Mark D. Rosen, *Why the Defense of Marriage Act Is Not (Yet?) Unconstitutional: Lawrence, Full Faith and Credit, and the Many Societal Actors That Determine What the Constitution Requires*, 90 MINN. L. REV. 915, 935 (2006). Interestingly, we see similar arguments emerging from the field of personal jurisdiction, another doctrinal silo that has wrestled with the shortcomings of sovereignty. See *supra* notes 248–253 and accompanying text; Frederic M. Bloom, *Jurisdiction's Noble Lie*, 61 STAN. L. REV. 971, 1017 (2009) ("[P]liable jurisdictional limits . . . offer[ ] a way to cabin cultural disagreements, to achieve interstate accommodation, and to fold federalist tension into a kind of (precarious) national equipoise."); Richard K. Greenstein, *The Action Bias in American Law: Internet Jurisdiction and the Triumph of Zippo Dot Com*, 80 TEMP. L. REV. 21, 48 (2007) (Personal jurisdiction has "generate[d] its own tension between states' rights and national unity.").

like Professor Strasser, suggest that the “public-policy” exception represents an effort to strike a balance between what we would describe as the competing principles of democratic self-rule and union:

Merely because the law of a foreign state differs from the law of a forum state is not sufficient to justify the forum’s invocation of the public policy exception. The Supreme Court has noted that the Full Faith and Credit Clause requires states to submit to “hostile policies” of other states “because the practical operation of the federal system . . . demand[s] it.”<sup>261</sup>

Even the notion of sovereignty plays a complex role in these debates. The Full Faith and Credit Clause places the question of regulatory overlap squarely in front of us, and scholars disagree about whether forcing one state to recognize another’s law vindicates or undermines sovereignty—whether we should worry more about spillunders or spillovers.<sup>262</sup> That’s precisely the kind of debate we would expect once the field comes to grip with the reality of spillovers. As we note above, it is a mistake to think that the only form of state power that matters is a state’s ability to shield its citizens from out-of-state policies. A state’s power also encompasses the ability to extend state policies beyond its boundaries, as the debate over the recognition of same-sex marriages by other states makes clear. Those who care about state power should worry as much about spillunders as spillovers, and it’s interesting that those who write about the Full Faith and Credit Clause have made so much progress on this front.

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261. Mark Strasser, *Baker and Some Recipes for Disaster: On DOMA, Covenant Marriages, and Full Faith and Credit Jurisprudence*, 64 BROOK. L. REV. 307, 321 (1998) (citation omitted).

262. Compare Glensy, *supra* note 259, at 153 (arguing that requiring states to grant full faith and credit to another state’s law “valorize[s] state power” because it “prevents any one state from insulating itself from the others”), with Rosen, *supra* note 260, at 935–37 (suggesting that the clause undermines the ability of a state to abide by its own preferred laws). Sharkey spots a similar tension in the Court’s due-process and punitive-damages cases. See Catherine M. Sharkey, *Federal Incursions and State Defiance: Punitive Damages in the Wake of Phillip Morris v. Williams*, 46 WILLAMETTE L. REV. 449, 457 (2010). Sharkey writes that “[v]indicating ‘state interests’ in this realm cuts in two separate directions.” *Id.* She then explains as follows:

On the one hand, each state maintains the prerogative to design and implement a punitive damages scheme in furtherance of its legitimate state interests. On the other hand, federal intervention may be necessary to restrain a state from imposing punitive damages that regulate beyond its borders, thereby trampling upon other states’ legitimate policy aims.

*Id.* We see traces of this debate in horizontal federalism’s other doctrinal silos. See, e.g., Michael P. Allen, *The Supreme Court, Punitive Damages and State Sovereignty*, 13 GEO. MASON L. REV. 1 (2004) (endorsing the sovereignty principle but finding that it is vindicated, not undermined, by allowing states to take extraterritorial conduct into account when awarding punitive damages); F. Patrick Hubbard, *Substantive Due Process Limits on Punitive Damages Awards: “Morals Without Technique?”*, 60 FLA. L. REV. 349, 389 (2008) (arguing that limits imposed by the Supreme Court’s due-process and punitive-damages cases restrict the ability of a state to “deter corporate misconduct within its borders” and thus “interfer[e] with a state’s sovereignty”).



Academics have also considered what limits the clause imposes on Congress's ability to contract or expand the duties that states owe to one another,<sup>263</sup> a discussion that tees up yet another crucial question in horizontal federalism: How should the courts and Congress interact as they jointly police interstate relations?<sup>264</sup> In answering this question, academics have argued over whether a political institution like Congress is well suited for addressing spillover problems. Some believe that the legislators are untrustworthy because they are "subject to plenty of short-term pressures to act badly or for inappropriate reasons."<sup>265</sup> Others insist that the legislative process is well suited to dealing with controversial choice-of-law problems because of its "characteristic capacity for accommodation and political compromise and its greater responsiveness to practical experience and changing needs."<sup>266</sup> Scholars of the Full Faith and Credit Clause have, in short, begun to do just what we think scholars of horizontal federalism need to do more generally: study the role that politics plays in policing interstate conflict.

#### CONCLUSION

We'll conclude by redescribing what we believe to be the first step toward building a safeguards account. The extant literature on horizontal federalism looks much like the early writing on vertical federalism. It is dominated by accounts of sovereignty and the importance of judicial review. Scholars are largely united behind a single goal: to reduce spillovers and the interstate friction that accompanies them. Little wonder, then, that the few scholars to have even considered whether the political safeguards of horizontal federalism exist have dismissed them out of hand. The basic foundations of a safeguards account are simply missing from the literature.

To build a robust and satisfying account of the political safeguards of horizontal federalism, one must begin with a descriptive and normative account of why much interstate conflict can and should be left to the free play of politics. We have attempted to offer that account here. We have explained that, contrary to the conventional wisdom, spillovers—and the interstate

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263. See, e.g., David E. Engdahl, *The Classic Rule of Faith and Credit*, 118 YALE L.J. 1584 (2009); Kramer, *supra* note 259; Kurt H. Nadelmann, *Full Faith and Credit to Judgments and Public Acts: A Historical-Analytical Reappraisal*, 56 MICH. L. REV. 33 (1957); Stephen E. Sachs, *Full Faith and Credit in the Early Congress*, 95 VA. L. REV. 1201 (2009); Ralph U. Whitten, *The Original Understanding of the Full Faith and Credit Clause and the Defense of Marriage Act*, 32 CREIGHTON L. REV. 255 (1998); Ralph U. Whitten, *The Constitutional Limitations on State Choice of Law: Full Faith and Credit*, 12 MEM. ST. U. L. REV. 1 (1981); Charles M. Yablon, *Madison's Full Faith and Credit Clause: A Historical Analysis*, 33 CARDOZO L. REV. 125 (2011); Laurence H. Tribe, *Toward a Less Perfect Union*, N.Y. TIMES, May 26, 1996, at E11, available at <http://www.nytimes.com/1996/05/25/opinion/toward-a-less-perfect-union.html>.

264. Interestingly, a few scholars have begun to raise a similar set of questions in the context of personal jurisdiction. See Erbsen, *supra* note 7, at 75–89. See generally Sachs, *supra* note 76.

265. Kramer, *supra* note 259, at 2006.

266. Engdahl, *supra* note 263, at 1592; see also Rosen, *supra* note 221, at 21–23.



friction they generate—offer substantial democratic benefits. We have questioned the assumptions that have led most scholars in the field not only to think that spillovers should be suppressed but to look to the judiciary for assistance. We have sketched a basic argument to support the notion that, despite the prevalence of spillovers, our system has proved to be reasonably robust. And we have begun to map the institutions that play a role in maintaining the political safeguards of horizontal federalism. All of these arguments require further development and refinement; the scholars of vertical federalism have spent decades on them, after all. This Article offers at least an initial take.

While we have begun to lay the foundation for a safeguards account, much work remains to complete it. We are plainly at the beginning of the conversation, not the end, but surely it's a conversation worth having.